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IN THE

Supreme Court of the United States

BETH B. and SUSAN AND TOM B.,
Individually and as Next Friends of BETH B.,

Petitioners,

v.

MARK VAN CLAY, Individually and in his Official Capacity as Superintendent, and LAKE BLUFF SCHOOL DISTRICT #65,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Individuals with Disabilities Education Act ("IDEA" or "the Act") expressly provides that states must ensure that children with disabilities "are educated with children who are not disabled" to the "maximum extent appropriate." 20 U.S.C.A. § 1412(a)(5)(A). The Seventh Circuit's holding in this case that a school district could remove a thirteen year-old girl with physical and cognitive disabilities from the regular classroom, despite the fact that she was progressing toward the educational goals set for her by the school district, raises the following questions of exceptional importance that have split the courts of appeals:

1. Whether, when the evidence was inconclusive, the Seventh Circuit erred by simply deferring to a school district's decision to remove a student from the regular education classroom?
2. What is the correct test for determining whether a student's placement will mainstream her to the maximum extent appropriate?
3. Whether the Seventh Circuit's narrow focus on academic progress in determining whether a student will receive a "satisfactory" education effectively reads the presumption in favor of mainstreaming out of the IDEA?

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The independent hearing officer's opinion (Appendix C) is not otherwise published. The district court's opinion (Appendix B) is not published, but is available at 2001 WL 1095026. The Seventh Circuit's opinion affirming the district court (Appendix A) is published at 282 F.3d 493. The Seventh Circuit's opinion denying rehearing and rehearing *en banc* (Appendix D) is not otherwise published.

STATEMENT OF JURISDICTION

The Seventh Circuit entered its opinion and order on March 5, 2002, and denied rehearing and rehearing *en banc* on April 3, 2002. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The provisions of the Individuals with Disabilities Education Act, 20 U.S.C.A. § 1400 *et seq.*, relevant to this petition are reprinted in Appendix E.

STATEMENT OF THE CASE

I. STATUTORY BACKGROUND

For the last quarter century, Congress has mandated that children with disabilities be educated side-by-side with their nondisabled peers in a regular school setting to the maximum extent appropriate. *See* IDEA § 1412(a)(5)(A). The clear congressional preference for "mainstreaming" a child with disabilities is expressly set forth in the IDEA and in its regulations. In establishing this statutory framework, Congress gave an important voice to the parents of children with disabilities when it provided a right to participate in the development of their child's educational program and to challenge a school district's placement decision in a due process hearing.[1] Before a child may be segregated in special

1. Congress first established procedural rights for parents of children with disabilities in the Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484 (1974). These rights were expanded in the Education for All Handicapped Children's Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1976), which was renamed the IDEA in 1990. *See* 20 U.S.C. §§ 1400-85.

education, a school district must establish that the child cannot receive an educational benefit in the regular classroom. The parents' voice is silenced — and the statutory framework is undermined — when courts excuse school districts from meeting this burden and defer to school districts' judgments about where a child should be educated.

In 1975, Congress passed legislation that would later become the IDEA. Before Congress stepped in, many state laws permitted the complete exclusion of students with disabilities from the classroom if school officials felt that the students would not benefit from public education. Philip T.K. Daniel, *Education for Students with Special Needs: The Judicially Defined Role of Parents in the Process,* 29 J.L. & Educ. 1, 4 n.27 (2000) (listing pre-IDEA state statutes). In North Carolina, for example, it was a misdemeanor for parents to insist that their child with a disability be educated in a regular school. Act of May 18, 1965, ch. 584, 1965 N.C. Sess. Laws 641 (amending N.C. Gen Stat. §§ 115-65 (1963)).

After persistent efforts by parents and advocates, and after two federal district courts recognized parents' rights to challenge the exclusion or expulsion of students with disabilities from the regular classroom, *see Pennsylvania Ass'n for Retarded Children v. Commonwealth*, 334 F. Supp. 1257 (E.D. Pa. 1971), and 343 F. Supp. 279 (1972); *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972), Congress intervened. As this Court observed, Congress' principal concern in enacting the IDEA was "the apparently widespread practice of relegating handicapped children to private institutions or warehousing them in special classes." *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 373 (1985). Indeed, the authors of the bill that became the IDEA believed in the importance of integration as an independent goal of the Act. Senator Stafford, one of the bill's co-sponsors, observed that segregating a child with disabilities means

> isolation for the handicapped child and for the "normal" child as well. The sooner we are able to bring the two

> together, the more likely that the attitudes of each toward one another will change for the better. I firmly believe that if we are to teach our children to love and understand each other, we must give them every opportunity to see what "different" children are like.

121 Cong. Rec. 19,484 (1975). Stressing the importance of contact between students with disabilities and their nondisabled peers, Congress endorsed mainstreaming as the nation's educational policy.[2]

Congress was also concerned about protecting the rights of students with disabilities — including the right to be educated with nondisabled peers. IDEA § 1415(a); H.R. Rep. No. 94-332, at 15 (June 26, 1975); 121 Cong. Rec. 23,703 (1975) (statement of Rep. Brademas). The law created grievance procedures to ensure that, among other things, "every handicapped child is in fact being educated in the least restrictive environment." H.R. Rep. No. 94-332, at 15 (June 26, 1975). Congressman Brademas, chair of the House Select Committee on Education, stated that the new law would strengthen the Education Amendments of 1974, which sought "to provide procedures for insuring that handicapped children and their parents are guaranteed procedural safeguards in identification and placement of the handicapped children; and that where possible, the handicapped child be integrated into a normal classroom environment." 121 Cong. Rec. 23,703 (1975).

The IDEA thus establishes both substantive standards and procedural safeguards that the States must follow in order to receive federal special education funds. As commentators have noted, the Act in its present form significantly limits an

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2. Recent research on mainstreaming reaffirms that students with disabilities who have been included in regular classrooms, particularly those in their home school, have larger, more durable networks of peers without disabilities. *See, e.g.*, Office of Special Education and Rehabilitative Services, U.S. Dep't of Educ., 21st Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, at III-23 (April 11, 2000).

educational agency's discretion as to instructional methods. *Id.* at 7; D. Huefner, *The Individuals with Disabilities Act Amendments of 1997,* 122 Educ. L. Rep. 1103, 1113 (1998).

The IDEA imposes two major and interdependent substantive requirements. First, it requires that school districts provide students with disabilities a "free appropriate public education" ("FAPE"), and second, that it educate them in the "least restrictive environment" ("LRE"). IDEA §§ 1412(a)(1), (a)(5)(A). In fact, schools may segregate children with disabilities "only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and materials *cannot* be achieved satisfactorily." *Id.* (emphasis added). The IDEA also requires that school districts ensure that children with disabilities "are educated with children *who are not disabled*" to the "*maximum* extent appropriate" and prevent unnecessary "special education, separate schooling, or other removal of children with disabilities from the regular education environment." IDEA § 1412(a)(5)(A) (emphasis added). *Id.*

The IDEA also provides parents with a number of procedural protections. Among them is the right to be involved in the formulation of the child's individualized education plan ("IEP"), which must set forth the child's present level of educational performance, list annual goals and short-term objectives, and describe the special intervention and necessary support services. 20 U.S.C. § 1414(d). If parents disagree with a school district's proposed IEP, they have the right to a due process hearing before an independent hearing officer ("IHO"). § 1415(f). Parents may appeal the IHO's decision by bringing a civil action before a state or federal court, which, after receiving the record of the administrative hearing and hearing additional evidence at the request of a party, "basing its decision on the preponderance of the evidence, shall grant such relief as [it] determines is appropriate." § 1415(i)(2).

In *Board of Education v. Rowley*, this Court held that the FAPE requirement is modest: a placement must only "confer

some educational benefit upon the handicapped child." 458 U.S. 176, 200 (1982). This Court, however, has not yet interpreted the LRE requirement. Rather than simply applying the language of the statute, the federal courts of appeals have constructed conflicting balancing tests to determine whether a school's placement meets the LRE requirement. *See Roncker v. Walter,* 700 F.2d 1058, 1062 (6th Cir. 1983); *Daniel R.R. v. State Bd. of Educ.,* 874 F.2d 1036, 1045-46 (5th Cir. 1989); *Sacramento City Unified Sch. Dist. v. Rachel H. by Holland,* 14 F.3d 1398 (9th Cir. 1994).

II. FACTUAL BACKGROUND

Petitioner Beth B. is a 13 year-old girl from Lake Bluff, Illinois. Until recently, she attended school in Lake Bluff School District No. 65 (the "School District"). Beth has Rett Syndrome, a rare neurological disorder caused by a defective regulatory gene on the X chromosome. *Beth B. v. Van Clay*, No. 00 C 4771, 2001 WL 1095026 (September 13, 2001) (hereinafter "App. B"); Due Process Hearing Administrative Record 5736-38 (hereinafter "AR"). Because males with the disorder cannot usually survive, Rett Syndrome appears almost exclusively in females, up to 1 in every 12,000-13,000 births. AR 5700.

Rett Syndrome affects girls both physically and cognitively. *See* AR 5700; AR 5709-25. The physical symptoms include loss of controlled speech and loss of control over purposeful body movement. AR 5700. This loss of control presents itself in both involuntary body movements and extreme difficulty in breaking through the involuntary movements to execute voluntary movements, sometimes resulting in significantly delayed reaction times to stimulus. *Id.* These physical symptoms make it difficult to evaluate accurately the cognitive abilities of children with Rett Syndrome, but no one disputes that most children with Rett Syndrome have some form of impairment to their cognitive reasoning. *See* AR 5709-25.

Rett Syndrome typically involves four phases. AR 5667-68. The first phase of Rett Syndrome is marked by apparently normal development until a child is between the ages of approximately six and 18 months. *Id.* At the onset of the second phase, the child begins to lose skills that they had previously gained, including speech, the ability to walk, and coordination. *Id.* During the second phase, involuntary repetitive hand movements, such as hand wringing or hand washing, appear and the child frequently loses interest in her surroundings. *Id.* After a few weeks or months, the third phase typically begins, and interest in surroundings, alertness, attention span, and communication skills improve, although loss of speech and control over body movement typically continue. *Id.* In the final phase, after about age 10, mobility decreases, but this decline is typically accompanied by a reduction in repetitive hand movements and an increase in a child's ability to maintain eye contact as a means of purposeful communication. *Id.* Girls with Rett Syndrome have the ability to learn throughout their lives. AR 5709-25; AR 8379-80.

Beth is currently in either the third or fourth phase of Rett Syndrome. She can walk with assistance, but relies primarily on her wheelchair to sit properly and to move any significant distance. AR 1722-1723. The IHO found that Beth expresses interest in people, smiles and laughs, responds positively to music and has definite likes and dislikes, which she expresses using her eye gaze, body movements, non-verbal vocalizations, reaching out, and facial expressions. *In re Elizabeth B. and Lake Bluff Sch. Dist. 65*, Decision of the Independent Hearing Officer 46a (May 26, 2000) (hereinafter "App. C").

Beth communicates primarily through her eye gaze with the use of a communication board — a board with various pictures on it to which she can gaze to indicate her wants and needs. *Beth B. v. Van Clay,* No. 00 C 4771, Tr. at 18. Beth also communicates using various augmentative communication devices. Among these are a "talker" — a device that enables her to push buttons that trigger messages recorded by her family

and friends — and "step-by-step" switches for conversational opportunities and the sharing of information, including telling of jokes. AR 6411; AR 8553-54. Beth also uses Intellikeys, a keyboard that uses standardized symbols or customized overlays that correspond to options among which Beth can choose, allowing her to communicate. AR 0017; AR 9596-97; AR 5290-308.

While Beth's disability makes measuring her progress difficult, the evidence submitted by both parties during the administrative hearing and the three-day progress hearing held by the district court in April and May of 2001 indicates that, despite inconsistent educational support,[3] Beth has made progress toward her IEP goals during her education in a regular classroom. *See Beth B. v. Van Clay*, No. 00 C 4771, Pl.'s Ex. 5; AR 2327-35; AR 10401-13; AR 11193; AR 13226-32.

Beth was educated in a self-contained special education classroom from age three to six. *See* App. C 47a. Beth then attended regular classes in her neighborhood school from kindergarten through sixth grade. *See* App. B 15a. In accordance with her IEP, a one-on-one aide has always worked with Beth in the classroom. While in regular education classes, Beth maintained a full class schedule throughout the year, although, due to medical issues and fatigue, Beth was sometimes absent.[4] App. B 32a n.10; Tr. at 16-17. In her academic classes, Beth primarily worked with her aide, inclusion facilitator, and therapists on an adapted curriculum using adapted books, her communication board, Intellikeys and an adapted computer. Beth's aide helped facilitate the interaction with her teacher and classmates. Tr. at 113-14.

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3. Due to a high turn-over rate in recent years, Beth has not been able to work consistently with the same aide for any significant period of time. For example, during her sixth grade year, Beth had a series of five different one-on-one aides, who worked with her for periods ranging from one day to four months. Tr. at 135-36.

4. On Wednesdays, Beth attended educational, physical and speech therapy rather than classes at Lake Bluff Middle School. Tr. at 16.

Beth's adapted curriculum was designed to correspond to that of her peers. AR 6898-99. For example, when her sixth-grade language arts class read a novel about mountain climbing, Beth followed with an adapted version of the book using her Intellikeys. Tr. at 412. When students in academic classes worked in groups, Beth would actively participate with her classmates. *See* AR 6432-34; AR 6440-42; AR 6920-23. In her non-academic classes, Beth participated in group activities more frequently. In music class, for example, Beth held and tapped a tambourine, as well as a range of other percussion instruments, while the other students sang or played instruments. AR 6425; AR 6475. Outside of school, Beth attended music therapy and horseback riding therapy every week. App. C 46a. Beth also belongs to a Girl Scout troop, attends religious classes, and played in her school band. *Id* at 47a; AR 6474-75.

Beth was making progress as a student in the regular education classroom, where she enjoyed and learned from the frequent interaction with her nondisabled classmates. Nevertheless, the School District decided to remove her from the regular classroom and segregate her in a self-contained special education classroom many miles away from her community and peers.

III. PROCEEDINGS BELOW

In 1997, the School District formalized its intention to remove Beth from her regular school classroom and bus her to a special education classroom in another school district with children who are largely non-communicative. App. 48a; AR 2322-38. Because Beth thrives in a literacy-rich and language-filled environment, particularly one where she interacts and communicates with peers who can respond to her, Beth's parents strongly disagreed with this recommendation. AR 4365-74.

Beth's parents therefore sought a due process hearing under the IDEA. IDEA, 20 U.S.C.A. § 1400 *et seq.* In order to determine what was best for Beth, her parents and the School District agreed to have Joseph Vaal, Ph.D., a school psychologist

and former administrator with the special education cooperative providing services for Beth independently evaluate her. AR 3822. After evaluating Beth, Dr. Vaal determined that she could be appropriately educated in a regular classroom in Lake Bluff. AR 10449; AR 3759-60. The School District disregarded this recommendation. AR 2312.

After numerous failed attempts at resolution, the matter proceeded to an administrative hearing. The IHO did not find that the School District's proposed placement of Beth was better than that conferred in regular school, nor did he conclude that she could not receive educational benefit from her regular school placement. *See* App. C 78a-79a. The IHO also noted that he found the conflict between Beth's parents and the School District "difficult, if not impossible to resolve" on the basis of the evidence presented at the hearing, nor could he "find decisive testimony or evidence in the record" to credit one side's report over the other. AR 78a. Nonetheless, he determined that the School District made an "adequate" effort in determining that Beth should be segregated. *Beth B. v. Van Clay*, 282 F.3d 493 (7th Cir. 2002), *in* Appendix A at 6a (hereinafter "App. A").

The experts who testified on Beth's behalf stated that placement in a regular classroom in her neighborhood school with a modified curriculum and special education support provides Beth with an appropriate education in the least restrictive environment. One of Beth's private therapists testified, not only that a regular classroom was the best placement for Beth, but also that placing her in special education classroom would be like a "death sentence" for Beth, because it would completely cut off her communication "life-line." Tr. at 307-08. The District, on the other hand, believes that Beth can only receive benefit from placement in a self-contained special education classroom with children who also have disabilities.

Beth's parents appealed to the U.S. District Court for the Northern District of Illinois under the IDEA, the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act.

App. B 13a-14a. After briefing on cross-motions for summary judgment, the district court granted summary judgment in favor of the School District. App. B 39a. The district court noted correctly that the School District bore the burden of proof at the administrative level, yet agreed with the IHO's equivocal decision that the segregated placement was appropriate as it was "likely to benefit Beth." App. B 23a.

Beth's parents then appealed to the Seventh Circuit Court of Appeals. The Seventh Circuit held that, despite her progress toward the goals set for her by the School District, Beth was not receiving a satisfactory education — in the academic sense — in the regular school environment. A panel affirmed the decision of the district court and soon thereafter denied Beth's parents' petition for a rehearing in the Seventh Circuit, with a suggestion for a rehearing *en banc*. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE TEXT AND LEGISLATIVE HISTORY OF THE IDEA AS WELL AS WITH THE THIRD AND NINTH CIRCUITS, BECAUSE THE COURT FAILED TO APPLY THE PRESUMPTION IN FAVOR OF MAINSTREAMING AND INSTEAD DEFERRED TO THE SCHOOL DISTRICT'S DECISION WITHOUT CONDUCTING A PROPER REVIEW

In light of Congress' express command that students like Beth be educated in the least restrictive environment and its creation of a grievance procedure to protect the rights of students with disabilities and their parents, the Seventh Circuit erred when it deferred to the School District's decision about the appropriate placement for Beth.[5] The text and enactment history of the IDEA show that Congress intended for school districts to mainstream

5. The Seventh Circuit endorsed a system of total deference to the school district when it affirmed an administrative decision that deferred entirely to the School District's placement decision. *See generally* App. A.

students with disabilities "whenever possible." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 202 (1982).

Congress recognized that school districts would sometimes need to be pushed to educate children with disabilities alongside their nondisabled peers and Congress, through the enforcement provisions of the IDEA, told the courts to do the pushing. Given a range of appropriate educational options for a child, it is up to the courts to ensure, through their review process, that school districts choose the placement and method that properly educates a student with disabilities "in the least restrictive environment." IDEA § 1412(a)(5)(A); 34 C.F.R. § 300.551.

Yet the Seventh Circuit's approach — in direct conflict with the Third and Ninth Circuits — endorses deference to a school district's segregated placement without requiring it to prove that removal of the student from the regular classroom is necessary. This "rubber stamp" approach to the IDEA essentially voids its enforcement provisions and strips children with disabilities of their right to challenge a school district's placement. If courts must always defer to a school district's "expertise" in resolving a conflict between a school and a child, then all parents and children lose before the fight even begins.

Preserving the rights of students with disabilities and their parents to enforce the mainstreaming presumption is an issue of exceptional importance that should be addressed by this Court.

A. The Seventh Circuit's deference to the School District's placement conflicts with the plain language and legislative history of the IDEA, because the Lake Bluff School District failed to meet the burden Congress imposed upon school districts that seek to remove disabled children from the regular classroom

The IDEA creates a presumption that children with disabilities should be educated in regular classrooms. States receiving federal funds must ensure that children with disabilities "are educated with children who are not disabled" to the "*maximum* extent appropriate." IDEA § 1412(a)(5)(A) (emphasis added). School districts must prevent unnecessary

"special education, separate schooling, or other removal of children with disabilities from the regular education environment." *Id.* In fact, students with disabilities may be segregated "only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and materials *cannot* be achieved satisfactorily." *Id.* (emphasis added).

While Congress did not mandate any particular educational method, and recognized that some students with disabilities should not be educated in the regular classroom, *Rowley*, 458 U.S. at 181 n.4, the words "maximum" and "cannot" in the text make plain Congress' intent that schools educate students with disabilities and their nondisabled peers together "whenever possible." *Id.* at 202. Congress intended to limit school districts' choices in some respects by conditioning receipt of federal funds on school district's compliance with the LRE requirement. If a student's disability can be accommodated within a range of methods and placements, the IDEA compels the school district to choose the method and placement that provides for the most mainstreaming.

The IDEA's enactment history reinforces the text's plain meaning. As this Court noted, "Congress was concerned about the apparently widespread practice of relegating handicapped children to private institutions or warehousing them in special classes." *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 373 (1985). Not content to let school districts police themselves, Congress established an appeals process for students with disabilities and their parents to assert their rights under the IDEA — including the right to be educated with nondisabled peers. IDEA § 1415(a); H.R. Rep. No. 94-332, at 15 (June 26, 1975); 121 Cong. Rec. 23,703 (1975) (statement of Rep. Brademas).

The author of these procedures, Congressman Miller, indicated that mainstreaming was to be the status quo: "[C]hildren ought to remain in a regular classroom until such time as it is determined, on the basis of sound testing and joint consultation with parents and the child, that it is in the best interest of the student to be placed in a special class."

121 Cong. Rec. 25,540 (1975). Moreover, Congressman Miller believed, as was later reflected in law,

> the burden of proof in terms of the effectiveness of a program ought to rest with that administrator or teacher who seeks for one reason or another to remove a child from a normal classroom; to segregate him or her from nonhandicapped children; to place him in a program of special education.

Id.

School districts bear the burden of proving by a preponderance of the evidence, at least at the administrative level, that a placement meets the IDEA's mainstreaming requirements. *Walczak v. Florida Unio Free Sch. Dist.*, 142 F.3d 119, 122 (2d Cir. 1998); *Clyde K. v. Puyallup Sch. Dist. No. 3*, 35 F.3d 1396, 1398-99 (9th Cir. 1994); *Furhmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1034-35 (3d Cir. 1993).[6]

While courts are to give "due weight" to the result of the administrative proceedings, courts are "to make an independent decision as to whether the requirements of the Act have been satisfied." *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290, 293 (7th Cir. 1988); *see also Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993); *Tice v. Botetourt County Sch. Bd.*, 908 F.2d 1200 (4th Cir. 1990). Logically, then, Congress' combination of the presumption in favor of mainstreaming and independent judicial review requires that, if the school district cannot prove by a preponderance of the evidence that one placement is superior to another, the court should require the school district to choose the less restrictive placement.

However, in Beth's case, when it affirmed the IHO's decision, the Seventh Circuit, like the district court before it, endorsed a deferential approach that shifts the burden of proof

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6. The Third Circuit concluded that the IDEA requires school districts to bear this burden at every level of appeal where the LRE standard is concerned. *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1218 (3d Cir. 1993).

to the parents, turning the IDEA's mainstreaming presumption on its head. During the longest administrative hearing in Illinois state history, both sides presented experts and evidence about Beth's abilities and the proper placement for a child with Rett Syndrome. Beth's parents offered experts who had worked closely with Beth for years, and who testified that other children with cognitive disabilities were being successfully educated in regular classrooms in other school districts. *See, e.g.*, AR 7084-7091; AR 7119. Nonetheless, the IHO sided with the School District for no reason other than that *it was the School District*, and rubber stamped its decision.

Given the lack of information about the proper educational setting for children with Rett Syndrome, the IDEA's presumption in favor of mainstreaming should have governed. *See* App. C 78a. But the IHO reached the opposite conclusion: in the absence of hard facts, he decided, the school district's choice, rather than Congress', prevails. While he admitted he "would be hard pressed if he had to make a decision about the kinds of programs likely to provide benefit (even in the limited *Rowley* sense) for the Student in this case . . . ," he did not believe "that he must address this issue in order to assess the appropriateness of the school district's proposed placement." App. C 79a. Instead of applying the standard established by Congress, the IHO substituted an entirely new standard, reasoning that a placement met the IDEA's mainstreaming requirements if the school district makes a "careful and competent analysis that includes reasonable efforts to obtain relevant information . . . ." App. C 80a; App. C 91a.

Thus, the appeals process designed to protect the rights of students with disabilities was reduced to an inquiry into whether the School District put on evidence that it jumped through the proper hoops. Beth's parents were forced to disprove something which had not been proven. Rather than requiring the School District to prove that Beth could not be educated in a regular classroom, the IHO placed Beth's parents in the unenviable position of proving that their child was worthy of education in the regular classroom.

Despite the fact that this deferential standard is exactly contrary to Congress' test and finds no support in either the text or the legislative history of the IDEA, both the district court and the Seventh Circuit endorsed it. According to the district court, "there have not been sufficient studies to determine . . . how to best educate students with this disorder. When there is no consensus among educators, all a school district can do is review the available literature then exercise its professional judgment as to how to best educate the student." App. B 21a. The Seventh Circuit likewise found that "[t]he school officials' decision about how best to educate Beth is based on expertise that we cannot match. . . . The placement shows a concern both for her development and for keeping her mainstreamed, to an appropriate extent, with her nondisabled peers." App. A 11a.

This approach converts what was intended by Congress to be a substantive burden of proof into a mere procedural one. In other words, school districts need not offer hearing officers or courts proof that their placements actually comply with the IDEA — only that the school officials conducted research before choosing the placements. Indeed, the IHO's opinion allows school districts to place children with disabilities in special education so long as the school district has made the placement decision in apparent good faith. *See* App. C 82a, 86a. Furthermore, the approach enables a school district to use the lack of information about a particular child's disability to invalidate the IDEA's mainstreaming presumption. Just as before the enactment of the IDEA's predecessor, under the Seventh Circuit's standard, school districts now may segregate students with disabilities even absent a sound basis for doing so. The result is that, under this standard, the grievance procedure Congress designed to ensure the IDEA's goal of mainstreaming students with disabilities becomes nothing more than a rubber stamp for any school district's placement decision.

B. The Seventh Circuit's deference to school districts squarely conflicts with other circuits' interpretations of the IDEA

The panel's decision in *Beth B.* is not the only Seventh Circuit case that advocates abject deference to school district decisions without leaving much room for independent review. In *Heather S. v. Wisconsin,* the court agreed with a school district's restrictive placement, simply deferring to the experts assembled as part of the child's IEP team: "[b]ecause each child's social and academic educational needs are different we rely on the IEP procedures to determine the correct mix." 125 F.3d 1045, 1057 (7th Cir. 1997). Admitting that there was "more than one solution to the problem of best educating [the student]," the Seventh Circuit nonetheless declared that a court is "particularly incapable of making such judgments, which is why it must defer to trained educators . . . ." *Id.* at 1057. This approach completely eviscerates the IDEA's protections for the rights of students with disabilities and their parents.

The Third and Ninth Circuits, by contrast, have rejected this approach. The Third Circuit would not "read the Supreme Court's salutary warnings against interference with educational methodology as an invitation to abdicate our obligation to enforce the statutory provisions [of the IDEA]." *Polk v. Susquehanna Intermediate Unit 16,* 853 F.2d 171, 184 (3d Cir. 1988); *see also Oberti v. Bd. of Educ.,* 995 F.2d 1204, 1214 (3d Cir. 1993) ("It is our duty to enforce the statutory requirement." (citing *Polk*, 853 F.2d at 184)). The Ninth Circuit observed that, "if the views of school personnel regarding an appropriate educational placement for a disabled child were conclusive, then administrative hearings conducted by an impartial decisionmaker would be unnecessary." *Ojai Unified Sch. Dist. v. Jackson,* 4 F.3d 1467, 1476 (9th Cir. 1993).

In fact, the Third Circuit recognized that it is precisely because a school district has educational expertise at its disposal that it must bear the burden when seeking to segregate students with disabilities. The Third Circuit requires school districts to

prove at every level of appeal that removing a child from a regular classroom is necessary. *Oberti*, 995 F.2d at 1214. The school district is in the best position to prove its case because it has superior educational expertise, better access to relevant information, and control over witnesses with daily access to the child. *Id.* at 1219. The presumption in favor of mainstreaming, it held, "would be turned on its head if parents had to prove that their child was worthy of being included, rather than the school district having to justify a decision to exclude the child from the regular classroom." *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 533 (3d Cir. 1995) (quoting *Oberti*, 995 F.2d at 1219).

Given the hearing officer's inability to decide, based on the available evidence, that segregated special education was the "least restrictive environment appropriate," App. C 78a, the Third and Ninth Circuits would have held that the School District failed to carry its burden of proof, and that Congress' statutory presumption for mainstreaming must control. By contrast, the Seventh Circuit deferred to the School District in a way that eviscerates the rights Congress provided to students with disabilities. This Court must intervene to resolve the conflict among the circuits and to ensure that Congress' intent is carried out.

II. BOTH THE SEVENTH CIRCUIT'S INTERPRETATION OF THE LRE REQUIREMENT AND OTHER CIRCUITS' LRE BALANCING TESTS CONFLICT WITH THE TEXT OF THE IDEA AND REQUIRE PARENTS TO PROVE THAT THEIR CHILD WITH A DISABILITY IS WORTHY OF REGULAR EDUCATION

The Seventh Circuit's deferential approach ignores the IDEA's mainstreaming presumption and exacerbates the disarray among the courts of appeals. By considering the FAPE and LRE requirements separately, the Seventh Circuit assumes that the school district's proposed placement is appropriate, and effectively shifts to parents the burden of proving that another

less restrictive placement would also be appropriate. Yet even if it had adopted one of the other circuits' balancing tests, the Seventh Circuit would have misinterpreted the LRE requirement. The LRE tests invented by the Sixth, Fifth, and Ninth Circuits add factors not found in the IDEA, and courts may use these new considerations to justify a school district's decision to remove children with disabilities from regular education.

This Court should reject these approaches and enforce the IDEA's presumption in favor of mainstreaming with a definitive interpretation of the LRE requirement based solely on the statute's text and regulations. Drawing on this Court's interpretation of the FAPE requirement in *Rowley* and Congress' intent that students with disabilities be mainstreamed where appropriate, this Court should hold that students with disabilities who can receive some educational benefit in the regular classroom with necessary aids and services should be entitled to remain there.

A. When the Seventh Circuit isolated the FAPE and LRE requirements, it placed the burden on parents to prove the school's placement is not the LRE, ignoring Congress' intent and creating a conflict with the settled law of the D.C., Third, and Fifth Circuits

This Court has determined that the IDEA's requirement that school boards provide a FAPE means that they must "confer some educational benefit upon the handicapped child." *Rowley*, 458 U.S. at 200. Beth's parents argue that the LRE and the FAPE are interdependent and must be read together. App. A 7a; *see also Carlisle*, 62 F.3d at 535; *Sherri A.D. v. Kirby*, 975 F.2d 193, 206-07 (5th Cir. 1992); *Kerkam v. Superintendent, D.C. Pub. Schs.*, 931 F.2d 84, 87 (D.C. Cir. 1991). If a child is receiving a FAPE in a regular classroom, that is the "least restrictive environment" appropriate under the IDEA. However, the Seventh Circuit requires the FAPE requirement to be determined separately, and in isolation from the LRE requirement: "The FAPE provision and LRE provision are two

sides of the same IEP coin. The [FAPE] requirement is absolute. . . . The [LRE] is relative. . . ." App. A 7a.

By considering the IDEA requirements separately — each with its own independent test — the Seventh Circuit effectively reads the statutory presumption in favor of mainstreaming out of the statute. Under the Seventh Circuit's approach, once a school district's placement meets the FAPE standard — regardless of how the school district provides "a free and appropriate education" — the school district's proposed placement becomes the starting place for the LRE analysis. The parents must then bear the burden of offering another, less restrictive alternative, reversing the burden of proof intended by Congress. But when the two requirements are considered together, the school district must meet them both at once, properly placing the burden on the school district of proving that the child is receiving a free appropriate public education in the least restrictive environment, as Congress intended.

Moreover, the Seventh Circuit's isolation of the two requirements creates a conflict with the D.C., Fifth, and Third Circuits, each of which have read the FAPE and LRE requirements together. For example, in *Kerkam*, the D.C. Circuit defined the least restrictive environment as "one that confers *some educational benefit* but most closely approximates education with nonhandicapped children in the school that the handicapped child would attend if he had no handicap." 931 F.2d at 86 (emphasis added). The D.C. Circuit held that the district court could not require the school to reimburse parents for a disabled child's education at a residential facility when the hearing officer had concluded that "a nonresidential placement could confer some educational benefit" upon the child. *Id.* at 88. Despite the fact that the segregated placement would confer more educational benefit, the court concluded, "*Rowley* precludes our taking that factor into account so long as the public-school alternative confers some educational benefit." *Id.* at 87.

The Fifth and the Third Circuits also read the IDEA's FAPE and LRE requirement together. *Sherri A.D.*, 975 F.2d at 206; *Carlisle*, 62 F.3d at 535-36. The Fifth Circuit, citing both *Rowley* and *Kerkam*, upheld a magistrate judge's order transferring a student with cognitive disabilities from a School for the Blind to a less restrictive public school placement. *Sherri A.D.*, 975 F.2d at 206. The court held that, "[w]hile the School for the Blind might be capable of providing services from which Sherri may obtain 'educational benefit' (the standard for 'appropriateness' of free public education under *Rowley*), the School for the Blind is not the least restrictive environment in which Sherri may receive appropriate educational services." *Id.* The Third Circuit also followed this approach in *Carlisle*, concluding that an IEP "must not only be designed to confer some educational benefit, but it also must deliver the programming in the least restrictive educational environment" and that the LRE "command" limited the court's authority to order a placement more restrictive than one that conferred "some educational benefit." 62 F.3d at 535.

Under the Seventh Circuit's formulation, parents must prove that a less restrictive placement would also be "appropriate." But had Beth's case been considered in the circuits holding that the two requirements are interdependent, the fact that Beth received "some educational benefit" from her placement would have meant keeping her in the regular classroom. This Court should intervene to enforce the IDEA's mainstreaming presumption and resolve the conflict created by the Seventh Circuit's decision.

B. The LRE balancing tests adopted by other circuits ignore Congress' intent and weaken the IDEA's presumption in favor of mainstreaming by adding factors not found in the text

As discussed above, while this Court has interpreted the FAPE requirement as calling for school districts to provide students with disabilities with, at a minimum, "some educational benefit," *Rowley*, 458 U.S. at 200, it has not yet interpreted the

LRE requirement. Indeed, different lower courts, in the absence of direct guidance, have formulated conflicting tests to determine whether a school district has mainstreamed a student with a disability "to the maximum extent appropriate." *See, e.g., Roncker v. Walter,* 700 F.2d 1058, 1063 (6th Cir. 1983). There is fundamental disagreement among the courts of appeals and the lower courts, not only about how much courts should defer to school districts, but also about the factors courts should apply when evaluating a school's placement decision. The disarray among the circuits makes the rights of students with disabilities contingent on geography, creating an urgent need for this Court's intervention. But more importantly, none of the tests give sufficient weight to the IDEA's presumption in favor of mainstreaming, and all of them add countervailing factors not found in the IDEA's text.

Because Beth was making progress toward the goals set out in her IEP, Beth belonged in the regular classroom under a fair application of any of the circuits' tests. Nonetheless, in adopting multi-factor tests, instead of simply enforcing the IDEA's text and implementing regulations, the circuit courts have abandoned Congress' intent and instead adopted their own preferences. Indeed, when it has interpreted the IDEA, this Court has rejected such balancing tests at every opportunity. *See Rowley,* 458 U.S. at 187-88; *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66, 75-76 (1999). In *Rowley,* this Court held that, even though the definition of "appropriate" was not completely comprehensive, courts may not "abandon[ ] the quest for legislative intent" and create their own tests. 458 U.S. at 188. Rather, this Court was "loath to conclude that Congress failed to offer any assistance" in defining the meaning of "appropriate," and proceeded to interpret Congress' intent using the language of the statute and its implementing regulations. *Id.* at 187. Similarly, with regard to the LRE requirement, the text, together with the implementing regulations, provide a satisfactory framework for evaluating school districts' placement decisions.

Each of the other circuits' tests purports to follow the IDEA's text, but each quickly departs from the text in a way that weakens the Act's presumption in favor of mainstreaming. The *Roncker* "feasibility" test has been adopted by the Sixth, Fourth, and Eighth Circuits. *Roncker,* 700 F.2d at 1063; *Devries v. Fairfax County Sch. Bd.,* 882 F.2d 876, 878-79 (4th Cir. 1989); *A.W. v. Northwest R-1 Sch. Dist.,* 813 F.2d 158, 163 (6th Cir. 1987). In *Roncker,* the Sixth Circuit failed to refer to the text requiring that a child with disabilities be removed "*only* when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services *cannot* be achieved satisfactorily." *Compare Roncker*, 700 F.2d *passim with* IDEA § 1412(a)(5)(A) (emphasis added). Instead, the court simply declared that a special education placement meets the "least restrictive environment" requirement if what makes a segregated environment superior cannot be duplicated in the regular classroom, if the child is disruptive,[7] or if marginal benefits from mainstreaming are far outweighed by benefits from regular education. *Roncker*, 700 F.2d at 1063. The court also declared, without support from the IDEA's text, that the cost of mainstreaming is a factor. *Id.*

In 1989, the Fifth Circuit rejected the *Roncker* test because the court felt it "necessitates too intrusive an inquiry into the educational policy choices that Congress deliberately left to state and local school officials." *Daniel R.R. v. State Bd. of Educ.,* 874 F.2d 1036, 1046 (5th Cir. 1989). Even so, while purporting to follow the text of the IDEA, the Fifth Circuit quickly resorted to judicially-constructed standards and balancing tests, concluding that a court "must examine the child's overall educational experience in the mainstreamed environment, balancing the benefits of regular and special education for each individual child." *Id.* at 1049.[8] The Eleventh Circuit adopted

7. The district court in this case concluded that any disruptions caused by Beth are "infrequent and relatively mild," and thus the court did "not ascribe much weight to it." App. B 34a.

8. Under the *Daniel R.R.* test, courts ask first whether education (Cont'd)

this test as well. *See Greer v. Rome City S.D.*, 950 F.2d 688, 696 (11th Cir. 1991).

The Third Circuit also rejected *Roncker* and adopted the *Daniel R.R.* test, but for the opposite reason: *Daniel R.R.* was superior, the Third Circuit held, because it required schools to provide for more integration. *Oberti*, 995 F.2d at 1215. Unlike the Fifth Circuit, the Third Circuit stressed the importance of mainstreaming under the IDEA because of the non-educational benefits it provides to students with disabilities and nondisabled students alike: "Congress understood that a fundamental value of the right to public education for children with disabilities is the right to associate with nondisabled peers." *Id.* at 1216-17. Thus, while it adds factors not found in the text, the Third Circuit's approach comes closest to properly enforcing the IDEA's mainstreaming presumption.

Finally, the Ninth Circuit in 1994 adopted a four-factor balancing test that is also at odds with the plain language of the IDEA. The Ninth Circuit would have courts weigh four judicially-constructed factors evenly, without regard to the IDEA's presumption in favor of mainstreaming. *See Sacramento City Unified Sch. Dist. v. Rachel H. by Holland*, 14 F.3d 1398, 1404 (9th Cir. 1994).[9]

(Cont'd)
in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily for a given child. *Daniel R.R.*,874 F.2d. at 1048. The court in *Daniel R.R.* considered four factors under this part. *See id.* at 1048-50. Next, if education in a regular classroom cannot be achieved satisfactorily, the court asks whether the school district has mainstreamed the disabled student to the maximum extent appropriate. *Id.* at 1050.

9. The *Holland* test requires courts to consider four separate factors: (1) the academic benefits of placement in a mainstream setting, with any supplementary aids and services that might be appropriate; (2) the nonacademic benefits of placement in a mainstream setting, such as language and behavior models provided by nondisabled students; (3) the negative effects the student's presence may have on the teacher and other students; and (4) the cost of the regular classroom placement. 14 F.3d at 1404.

While each of these circuits believed that the IDEA invites courts to weigh various factors to strike a balance between educational benefits and mainstreaming, Congress' intent can only be fully effectuated by applying the text of the IDEA and its regulations without creating new standards and balancing tests. This Court should take the opportunity to resolve the conflicts among the circuits.

C. This Court should resolve the conflicts among the circuits by holding that, under the IDEA, students with disabilities who can receive an educational benefit in the regular classroom with necessary aids and services should be entitled to learn alongside their nondisabled peers

This Court should hold that students with disabilities like Beth, who can, without disrupting the class, receive an educational benefit in the regular classroom assisted by the full range of necessary aids and services should remain in the regular classroom. The text of the IDEA, the implementing regulations, and Congress' intent compel this conclusion.

As this Court has determined, a school district's placement satisfies the FAPE requirement if the student receives "some educational benefit." *Rowley,* 458 U.S. at 200. Thus, provided that the student with a disability does not disrupt other students' learning, the regular classroom is the LRE for a child if she can receive "some educational benefit" there. In other words, as the text says, schools may remove children with disabilities "only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and materials *cannot* be achieved satisfactorily." IDEA § 1412(a)(5)(A) (emphasis added). The regulations set forth the efforts school districts must make to provide the student with an educational benefit in the regular classroom. The general curriculum must be modified as needed, *see* 34 C.F.R. § 300.552(e), "the full range of supplementary aides and services" must be provided, and the school district must consider "any harmful effect" on the child from special education. 64 Fed. Reg. 12,471 (Mar. 12, 1999).

Taken together, the text and regulations provide a standard for applying the IDEA's presumption in favor of mainstreaming and carrying out Congress' intent, "to open the door of public education" to all qualified children and "educate handicapped children with nonhandicapped children whenever possible." *Garret F.*, 526 U.S. at 78 (quoting *Rowley*, 458 U.S. at 202). If they can receive an educational benefit, students with disabilities should not be denied access to the public school classroom.

III. THE SEVENTH CIRCUIT'S DEFINITION OF A "SATISFACTORY" EDUCATION EFFECTIVELY READS THE PRESUMPTION IN FAVOR OF MAINSTREAMING OUT OF THE IDEA AND CONFLICTS WITH THE THIRD CIRCUIT, THUS CREATING AN IMPORTANT QUESTION OF FEDERAL LAW THAT MUST BE SETTLED BY THIS COURT

The Seventh Circuit effectively read the presumption in favor of mainstreaming out of the IDEA when it focused on Beth's lack of *academic* progress in the regular classroom environment. Indeed, the court seemed to compare Beth's progress to that of her nondisabled peers — an approach in clear conflict with the purposes of the IDEA. Furthermore, the Seventh Circuit's holding conflicts with the Third Circuit's test, which directs courts to examine the benefits of regular education to both children with disabilities and their nondisabled classmates.

A. The Seventh Circuit's focus on Beth's lack of academic progress effectively reads the presumption in favor of mainstreaming out of the IDEA

In this case, the Seventh Circuit applied a far too rigorous standard when it found that Beth's educational achievement did not constitute a satisfactory education. App. A 11a. Indeed, while the Court recognized that Beth made *developmental* progress, it mistakenly focused on whether she made traditional *academic* progress when it concluded that her progress "[did] not constitute a satisfactory education." *Id.*

This standard conflicts with, indeed, it essentially reads out of the IDEA, the requirement that all children be mainstreamed to the maximum extent appropriate, regardless of whether they have cognitive disabilities that prevent them from making progress in the traditional academic sense. IDEA § 1412(a)(5)(A). This standard is at odds with Congress' intent, as the IDEA and its implementing regulations emphasize, that the mainstreaming of children with disabilities is intended to benefit both those children *and* their nondisabled peers. Furthermore, nowhere does the IDEA require that a child with disabilities learn the same skills, or at the same level, as her nondisabled peers.

Beth received numerous educational benefits from her regular school placement, and met a substantial number of the goals set out for her *by the School District* in her IEP. For example, the School District's own 1999 IEP progress report shows that (1) Beth greatly increased her ability to respond to a social greeting, substantially improving over her 1997 performance; (2) Beth reached near-mastery levels in the skill of responding to verbal requests to "look" or "touch;" (3) she showed progress in her ability to make choices between two different objects or activities, whereas two years earlier Beth's choices appeared random; and (4) Beth learned to activate a switch to engage in an activity, like music, at near-mastery levels. AR 2327-35. Furthermore, one of Beth's private therapists, Susan Norwell, testified that Beth had progressed in *thirteen* of the sixteen objectives *set by the School District. Beth B. v. Van Clay*, No. 00 C 4471, Pl.'s Ex. 5.

Rather than focus on these benefits, however, the Seventh Circuit, and the district court before it, focused almost entirely on Beth's progress in relation to the general school curriculum. For instance, the Seventh Circuit noted that "[h]er academic progress was virtually nonexistent. . . ." App. A 11a. The district court pointed out that she cannot "keep pace with the class" and she has what amounts to a "parallel curriculum." App. B 32a.

The Seventh Circuit's opinion would require children with disabilities to meet an impossible, and fundamentally unfair, standard. In order for a child with disabilities to show progress — to show that she is receiving an educational benefit — the Seventh Circuit holds she must do *more* than meet her individually-tailored IEP goals. Simply put, Beth's inability to achieve at the same level as her nondisabled peers cannot be the basis for deciding that she does not receive an educational benefit from the regular classroom. *See Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000). Beth's achievements will seem small when measured by the standards of her nondisabled peers, but she should not be barred from education in a regular classroom simply because she achieves on a smaller scale than her nondisabled peers. Indeed, to measure her progress in such a way is to discount her achievements altogether. Even the School District concedes that "there are clearly some areas in which Beth has displayed some progress." AR 8401. That Beth cannot achieve along the same academic lines as her classmates is irrelevant to the individualized inquiry into educational benefit required by the IDEA. The progress Beth did demonstrate shows that she was making significant strides toward many of her goals; most importantly perhaps, she was learning how to communicate with other people. Given the nature and severity of Beth's disability, this is a satisfactory education for her — indeed, it is the optimal one for her.

B. The Seventh Circuit's focus on Beth's lack of academic progress conflicts with the Third Circuit which emphasizes the non-academic benefits of placing children with disabilities in the regular education environment

The Seventh Circuit's focus on academic progress conflicts with the Third Circuit's decision in *Oberti v. Board of Education*. 995 F.2d at 1216-17. There, the Third Circuit applied a fair, workable test for what constitutes a satisfactory education, as it measured "progress" in relation to the abilities of the particular student, not in comparison to her nondisabled peers. *Id.* Indeed,

the progress made by nondisabled students in relation to ones with disabilities is utterly irrelevant. *Id.* Children with disabilities must be measured in terms of their IEP, which is what the *Oberti* court called the "'centerpiece' of the [IDEA]." *Id.* at 1213 n.16. For instance, the *Oberti* court stressed that social development, which the Seventh Circuit dismissed as trivial, is a factor constituting educational progress. *Id.* Furthermore, the Third Circuit acknowledged that courts should compare "the educational benefits the child will receive in a regular classroom (with supplementary aids and services) and the benefits the child will receive in the segregated, special education classroom." *Id.* at 1216.

However, the *Oberti* court, in sharp contrast to the Seventh Circuit, stressed that "the court must pay special attention to those *unique benefits* the child may obtain from integration in a regular classroom which cannot be achieved in a segregated environment." *Id.* Indeed, the *Oberti* court noted that Congress' intent in enacting the IDEA was that children with disabilities would learn "to associate, communicate and cooperate with nondisabled persons. . . ." *Id.* at 1216 n.23. Such is "essential to the personal independence of children with disabilities." *Id.* The goal of the IDEA, after all, is that children with and without disabilities learn together as much as possible, for the benefit of both. Of course, children with or without disabilities are more likely to form and maintain friendships if they advance together from grade to grade.[10]

The Seventh Circuit's standard, in fact, flatly ignores the benefits children like Beth receive in the regular classroom. *Id.* at 1216-17 ("a child may only be able to absorb a minimal amount of the regular education program, but may benefit enormously from the language models that his nonhandicapped peers provide" (quoting *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1049 (5th Cir. 1989))). Moreover, the Seventh Circuit did not consider the appropriateness of placing Beth in a segregated environment before recommending it. 34 C.F.R.

10. *See supra* note 2.

§ 300.552(d). Indeed, the bus ride required to reach the nearest ELS classroom (45 minutes to an hour) would be exhausting for Beth, leaving her unable to participate in the planned activity. AR 11413-14; AR 10672; Tr. 308. Perhaps worst of all, however, is that the court in this case failed to acknowledge that a "fundamental value of the right to public education for children with disabilities is the right to associate with nondisabled peers." *Oberti*, 995 F.2d at 1216-17.

The Seventh Circuit's opinion requires students with disabilities to justify their presence in regular education classrooms by progressing at the same level as their nondisabled peers or moving quickly to catch up to them. Not only is this standard impossible to reach for many children who, like Beth, suffer from disabilities that make comparison with their nondisabled peers unfair, it also flies in the face of the IDEA and the Third Circuit's interpretation thereof.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED MARCH 5, 2002

IN
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 01-3673

BETH B. AND SUSAN AND TOM B., INDIVIDUALLY AND AS NEXT FRIENDS OF BETH B.,

Plaintiffs-Appellants,

v.

MARK VAN CLAY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT, AND LAKE BLUFF SCHOOL DISTRICT # 65,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 00 C 4771 — **James B. Moran** *Judge*.

ARGUED JAN. 17, 2002 — DECIDED MARCH 5, 2002

Before FLAUM, *Chief Judge*, and BAUER, and EASTERBROOK, *Circuit Judges*.

Appendix A

FLAUM, *Chief Judge*. Thirteen-year-old Beth B and her parents appeal the district court's grant of summary judgment to the Lake Bluff School District, affirming an administrative decision that upheld the school district's recommendation to place Beth in a special education classroom. Beth is severely mentally and physically challenged. Her parents have long been fighting a battle to keep her in the regular education classroom: In 1997, the school district first recommended that Beth continue her schooling in a special education, or Educational Life Skills ("ELS"), program — a placement with which her parents disagreed. When it became clear that they and the district could not reach a mutually satisfactory solution, they requested a due process hearing under § 1415(f) of the Individuals with Disabilities Education Act ("IDEA," or "the Act"), 20 U.S.C. § 1400 *et seq*. The hearing commenced on October 25, 1999; in May 2000, the hearing officer ruled in favor of the school district. Beth's parents sought review in the district court and, on September 10, 2001, the court affirmed the hearing officer's conclusion, granting Lake Bluff's motion for summary judgment. Beth and her parents now appeal to us. We recognize the difficult decisions that Beth's parents face, and we appreciate the care and commitment with which they participate in their daughter's education. However, after looking to the language of the IDEA and the congressional intent behind it, we conclude that the school district's placement does not violate the Act. For the reasons stated herein, we affirm the decision of the district court.

Appendix A

I. Background

Beth has Rett Syndrome, a neurological disorder that almost exclusively affects girls. It results in severe disabilities, both cognitive and physical. Beth is nonverbal; she uses an instrument called an eye gaze, a board with various pictures and symbols that she singles out with eye contact, to communicate her wants and needs, as well as other communication devices that allow her to choose among symbols *or* to hear messages recorded by others. She relies on a wheelchair for mobility. She, like nearly all Rett sufferers, has an extreme lack of control over body movement. Although her mental capacity is difficult to assess precisely, due to her extreme communicative and motor impairments, some experts contend that she has the cognitive ability of a twelve-to-eighteen-month old infant. Others estimate that she has the ability of a four-to-six-year old. She is unable to read or recognize numbers.

Beth has been educated in regular classrooms at her neighborhood public school for seven years. She is currently in the seventh grade at Lake Bluff Middle School with other thirteen-year-old children. Students in the seventh grade attend six 42-minute classes a day. They have three-minute passing periods between class. Beth's aides help her travel from room to room during the passing periods, although it is extremely difficult for her to do so in such a short time frame. Since the first grade, Beth has worked with a one-on-one aide at all times and has used an individualized curriculum tied in subject matter, as much as possible, to that of the other students in the class. Beth's current curriculum is geared toward someone at a preschool level. When her peers worked

on mathematics, she was exposed to various numbers. When the class studied meteorology and weather patterns, she looked at pictures of clouds. Beth cannot participate in class discussions or lectures.

The school district held an annual conference with Beth's parents, teachers, and district administrators to review Beth's individualized education program ("IEP"). After her second grade year, the school district recommended at her IEP meeting that Beth be placed in an ELS setting. No appropriate special education environment exists in the Lake Bluff District; Beth would have to attend school in a neighboring school district[1]. The ELS program recommended by the district would be located in a public school building and would serve students between the ages of six and twenty one with mild, moderate, or severe handicaps. Generally, six to eight students comprise one ELS classroom, and the student-teacher ratio is one-to-one. ELS students in the program are mainstreamed into regular education classrooms during music, library, art, computer, and certain social studies and science classes, and join other students at the school during lunch, recess, assemblies, and field trips. Additionally, reverse mainstreaming is employed; that is, regular education students come into the ELS classroom to allow for interaction between ELS and non-ELS students.

Beth's parents disagreed with Beth's placement in an ELS program, requested a due process review under the IDEA,

1. It is not yet determined at which school Beth's classroom will be. The district has recommended that she be placed in an ELS class at a public junior high school, several of which are under an hour from Beth's home.

and invoked the Act's stay-put provision, which has allowed Beth to remain in the regular classroom at her neighborhood school pending the resolution of this litigation. 20 U.S.C. § 1415(j).

II. Discussion

Beth's parents argue that the school district's placement of Beth in an ELS classroom violates the IDEA.[2] The district court erred, they contend, in upholding the administrative decision finding otherwise. Although we review the school board's ultimate decision *de novo* because it is a mixed question of law and fact, we will reverse only if the district court's findings were clearly erroneous, absent a mistake of law. *LaGrange*, 184 F.3d at 915.

A. Deference to the Findings of the Administrative Hearing Officer

We find as an initial matter that the district court gave proper weight to the findings of the hearing officer at the administrative proceedings. Because school authorities are

2. Although the motion granted by the district court was properly labeled one for summary judgment, this type of IDEA decision does not fit neatly into the generic definition of such a disposition. Due to the unique procedural posture of these cases, however, summary judgment has been deemed appropriate even when facts are in dispute, and is based on a preponderance of the evidence. *Bd. of Educ. of LaGrange School Dist. No. 105 v. Illinois State Bd. of Educ.*, 184 F.3d 912, 914-15 (1999) (hereinafter *LaGrange*); *A.P. v. McGrew*, 1998 WL 808879 (N.D. Ill. Nov. 16, 1998). As the district court below noted, its decision is perhaps better described as judgment on the record.

better suited than are federal judges to determine educational policy, the district court is required, in its independent evaluation of the evidence, to give due deference to the results of the administrative proceedings. *Id.* (citing *Heather S. v. Wisconsin*, 125 F.3d 1045 (7th Cir. 1997)). The hearing officer correctly applied the burden of proof and found that the district satisfactorily showed that its proposed IEP was adequate under the IDEA. The district was not required to prove that Beth received no educational benefit at her local school, as her parents suggest. We also find that the hearing officer did not err as a matter of law in failing to consider whether the ELS placement was the least restrictive environment;[3] he did consider whether it was the least restrictive *appropriate* environment, that is, whether Beth would be mainstreamed to the maximum extent appropriate — the proper question under the LRE analysis discussed below. The district court, therefore, did not err in giving deference to the administrative decision after independently evaluating the evidence and even, in this case, updating it with an evidentiary hearing.

B. The IDEA

The IDEA, enacted in 1975 as The Education of All Handicapped Children's Act, entitles all children with disabilities to access to public education. Pub. L. No. 94-142, 89 Stat. 773 (1975). It conditions federal funding for educating disabled children on a state's compliance with certain conditions. A school district must provide such

3. In fact, it is undisputed that keeping Beth mainstreamed in the regular classroom would be less restrictive than placing her in the ELS program.

children with a free appropriate public education ("FAPE"), 20 U.S.C. § 1412(1), together, to the maximum extent appropriate, with nondisabled children ("least restrictive environment" or "LRE"). 20 U.S.C. § 1412(5). The FAPE provision and LRE provision are two sides of the same IEP coin. The first requirement is absolute and focuses on the school district's proposed placement — here, the ELS program; the second is relative and concentrates on other placement options — here, keeping Beth in the regular classroom. The LRE requirement shows Congress's strong preference in favor of mainstreaming, *LaGrange*, 184 F.3d at 915, but does not require, or even suggest, doing so when the regular classroom setting provides an unsatisfactory education. 34 C.F.R. § 300.550(b)(2) ("[S]pecial classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.").

1. FAPE

We agree with the district court and the hearing officer, and find that the district's recommendation to place Beth in an ELS classroom satisfies the FAPE requirement. In determining whether the district's placement of Beth meets the standard, we must ask: "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982). No one contests that the

program recommended during Beth's IEP review passes muster under this test; the FAPE mandate is, therefore, not at issue. Its discussion is required, however, because of the confusion that ensues when language from the FAPE requirement and analysis is misapplied to the LRE inquiry.

Beth's parents confuse the FAPE side of the coin with the LRE side. They contend that Beth's current placement satisfies the *Rowley* standard because she received an educational benefit at Lake Bluff Middle School. So long as the regular classroom confers "some educational benefit" to Beth, they argue, 458 U.S. at 200, the school district cannot remove her from that setting. This language is misplaced. The *Rowley* holding applies only to the school district's responsibility to provide a FAPE — a requirement that analyzes the appropriateness of the district's placement — not the appropriateness of the ELS alternatives, including the regular education classroom. As the district court properly noted, the FAPE determination is at the threshold of the placement inquiry. Only with the subsequent LRE analysis does the question of the educational benefit to Beth in the regular classroom arise; in that context, the *Rowley* language does not apply. *See also Daniel R.R. v. Bd. of Educ.*, 874 F.2d 1036, 1045 (5th Cir. 1989); *A.W. v. Northwest R-1 School Dist.*, 813 F.2d 158, 163 (8th Cir. 1987); *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983).

2. LRE

The core of this dispute involves whether the school district's decision to place Beth in an ELS classroom violates the LRE provision of the IDEA. Under this clause, the district

must mainstream Beth — that is, provide her an education with her nondisabled peers — to the "greatest extent appropriate." 20 U.S.C. § 1412(5). Again, Congress used the modifier "appropriate" in stating the requirements of the Act, limiting its mainstreaming mandate. The regular classroom would be a less restrictive environment than the ELS classroom. That point is not at issue, however, because the Lake Bluff school district is not required to educate Beth in such an environment unless doing so would be appropriate. The Supreme Court, although it has not yet interpreted the language of the LRE provision, has stated that "[t]he Act's use of the word 'appropriate' thus seems to reflect Congress' recognition that some settings simply are not suitable environments for the participation of some handicapped children." *Rowley*, 458 U.S. at 197 n. 21. This case turns, then, on whether educating Beth in the regular classroom (or, more appropriately in the middle school setting, classrooms) would be appropriate.

The relevant IDEA regulation provides that children may not be removed from the regular classroom unless their education there, with the use of supplementary aids and services, cannot be achieved satisfactorily. 34 C.F.R. § 300.550(b)(2). This preference for mainstreaming demands a hard look and a careful analysis of the education Beth was receiving at Lake Bluff Middle School. Beth's parents rely on misplaced language from *Rowley* to argue that so long as she was receiving *any* benefit — improvement in eye contact, or progress in responding to a request to "look" or "touch" — her removal would violate the LRE requirement. We cannot agree with this definition of satisfactory education.

Rowley requires, in its analysis of the FAPE provision, "that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child." 458 U.S. at 200. The Court's rationale behind using this standard was "to leave the selection of educational policy and methods where they traditionally have resided — with state and local school officials." *Daniel R.R.*, 874 F.2d at 1044 (citing *Rowley*, 458 U.S. at 207). The standard is intended to give school districts "flexibility in educational planning." *Id.* By applying it to the LRE directive and arguing that the school district cannot remove Beth from the regular classroom if she receives *any* benefit there, Beth's parents turn the "some educational benefit" language on its head. Instead of granting flexibility to educators and school officials, it places an extreme restriction on their policymaking authority and the deference they are owed; it essentially vitiates school districts' authority to place any disabled children in separate special education environments. Neither Congress nor the Supreme Court intended such a result. *Rowley*, 458 U.S. at 181, fn. 4 ("Congress recognized that regular classrooms simply would not be a suitable setting for the education of many handicapped children.").

Each student's educational situation is unique. We find it unnecessary at this point in time to adopt a formal test for district courts uniformly to apply when deciding LRE cases. The Act itself provides enough of a framework for our discussion; if Beth's education at Lake Bluff Middle School was satisfactory, the school district would be in violation of the Act by removing her. If not, if its recommended placement will mainstream her to the maximum appropriate extent, no

violation occurs. In this case we can say with confidence that the Lake Bluff school district's decision to remove Beth from her regular school did not violate the IDEA's mandate to mainstream disabled children to the maximum extent appropriate. Beth was in class for about fifty percent of each day. Her academic progress was virtually nonexistent and her developmental progress was limited. Although the school district provided her with aides, communication devices, computerized books, and an individual curriculum, she was receiving very little benefit from her time there.

We agree with the school district's decision that a modicum of developmental achievement does not constitute a satisfactory education. The ELS classroom, so long as it includes reverse mainstreaming opportunities, as well as time spent with nondisabled peers in nonacademic classes, during special projects, lunch, and the like, is at an acceptable point along the "continuum of services" between total integration and complete segregation, and satisfies the requirement that Beth be mainstreamed to the maximum extent appropriate. 34 C.F.R. § 300.551; 20 U.S.C. § 1412(5). The school officials' decision about how to best educate Beth is based on expertise that we cannot match. They relied on years of evidence that Beth was not receiving a satisfactory education in the regular classroom. The placement shows a concern both for her development and for keeping her mainstreamed, to an appropriate extent, with her nondisabled peers. We cannot hold that the Lake Bluff School District has failed to provide her with the free, appropriate public education where she is mainstreamed to the maximum extent appropriate, to which she is entitled under the IDEA. Although we respect the input Beth's parents have given

regarding her placement and the their continued participation in IEP decisionmaking, educators "have the power to provide handicapped children with an education they consider more appropriate than that proposed by the parents." *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290, 297 (7th Cir. 1988). We find that the district's proposed IEP, which includes reverse mainstreaming and provides that Beth will take part in certain regular-education classes, does not violate the statutory LRE mandate.

III. Conclusion

For the reasons stated herein, we find that the school district's recommendation to place Beth in an ELS classroom does not violate the IDEA. We AFFIRM the decision of the district court.

No. 01-3673

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED SEPTEMBER 10, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 00 C 4771

BETH B. and SUSAN and TOM B.,
individually and as next friends of Beth B.,

Plaintiffs,

v.

MARK VAN CLAY, individually and in
his official capacity as superintendent,
and LAKE BLUFF SCHOOL DISTRICT No. 65,

Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiffs brought this action alleging defendants failed to provide Beth B. a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* and requesting that this court review an administrative decision upholding the district's decision to place her in a special education program. The complaint also includes counts seeking reimbursement for the costs of Beth's private therapy and alleging discrimination under

the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, and Section 504 of the Rehabilitation Act (Section 504), 29 U.S.C. § 794. Both parties moved for summary judgment. For the reasons below, we grant judgment for defendants.

BACKGROUND

Beth is a thirteen year old girl with Rett Syndrome. This neurodevelopmental disorder affects only one in ten thousand girls, and does not affect boys. It is characterized in the American Psychological Association Diagnostic and Statistical Manual IV as a form of autism, resulting in severe to profound disabilities to motor functioning, communication and cognition. Beth's motor skills are estimated between five and seven months. She can only walk with one-on-one assistance and is largely wheelchair-bound. These limitations, combined with her inability to speak, make traditional communication and cognition tests inappropriate. Estimates of cognition based on observations by private and District experts range from one to six years. Beth primarily communicates through eye gaze, looking at or away from a person to indicate "Yes" or "No," respectively, or looking at one item or picture from among several choices. She can sometimes manipulate a switch with her hand, although her motor skills may deteriorate as the disorder progresses to its next stage.

Beth began receiving services from the North Suburban Special Education School District (the Co-op), a special educational cooperative to which Lake Bluff belongs, in 1990, at age two, and was diagnosed with Rett Syndrome in 1991.

She participated in the Co-op's Early Childhood Program from 1991 through 1994. The Co-op provided Beth with a one-on-one aide, adaptive physical education, speech/language therapy, occupational therapy and physical therapy. To begin the 1994-95 school year, at her parents urging, Beth was placed in a regular kindergarten class, with a continuation of those services offered in the Early Childhood Program. The district convened a conference annually to review and update Beth's Individualized Education Program (IEP). In June 1997, at the IEP conference following Beth's second grade year, the District recommended Beth be placed in the Co-op's self-contained Educational Life Skills (ELS) program. For most of the school day Beth would be in a classroom with five to seven other students, many of whom also have forms of autism. The special education teachers are specifically trained and experienced in dealing with students with severe cognitive and communicative disabilities.

Beth's parents rejected this placement, demanded a due process review and invoked the IDEA's "stay put" provision. 20 U.S.C. § 1415(j). The impartial hearing officer (IHO), on May 26, 2000, ruled in favor of the district. Plaintiff sought review here. During the pendency of the due process hearing and these proceedings, Beth has continued in regular education, progressing with her peers through sixth grade.

Appendix B

DISCUSSION

I. Standard of Review

The IDEA brings cases to district courts in a rather uncommon procedural posture. We "shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing [our] decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2). This differs from our typical standard for reviewing administrative decisions in two major respects.

First, we have discretion whether to decide the matter solely on the administrative record or to accept additional evidence. The seminal case interpreting the "additional evidence" clause is *Town of Burlington v. Department of Education for Massachusetts,* 736 F.2d 773, 790-91 (1st Cir. 1984). The court recognized several reasons why a party may wish to present new evidence to the district court, including updates on the student's progress, and expert testimony which would have been unnecessary before a presumably expert hearing officer. But it warned us that

> the trial court must be careful not to allow such evidence to change the character of the hearing from one of review to a trial de novo. . . . [A] court should weigh heavily the important concerns of not allowing a party to undercut the statutory role of the administrative expertise, the unfairness involved in one party's reserving its best evidence

> for trial, the reason the [evidence was not available] at the administrative hearing, and conservation of judicial resources.

Id. at 791, *cited with approval by Monticello School Dist. No. 25 v. George L.*, 102 F.3d 895, 901-02 (7th Cir. 1996). We held a three-day evidentiary hearing, to supplement the record from a 19-day administrative hearing.

Second, we apply a unique standard of review. Our review here is more stringent than merely ensuring that the hearing officer's decision is supported by substantial evidence, but it is not completely *de novo* either. We are to give "due weight" to the hearing officer's findings. *See Heather S. v. Wisconsin,* 125 F.3d 1045, 1052 (7th Cir. 1997). But we must not "substitute [our] own notions of sound educational policy for those of the school authorities." *Board of Educ. of Community Consol. Sch. Dist. 21 v. ISBE (Dist. 21),* 938 F.3d 712, 715-16 (7th Cir. 1991). Hearing officers have much greater expertise in educational policies, and judges should not second-guess them. We independently evaluate the testimony and evidence, but defer to the hearing officer's determinations. *See Heather S.*, 125 F.3d at 1053. Essentially this means we should not reverse the hearing officer's findings simply because we disagree with them. We also, of course, review purely legal questions *de novo. See Morton Community Unit School Dist. No. 709 v. J.M.*, 152 F.3d 583, 588 (7th Cir. 1998).

Currently pending are the parties' cross-motions for summary judgment. There are many disputed facts and ordinarily this would preclude summary judgment. *See Anderson v.*

Liberty Lobby, 477 U.S. 242, 249 (1986). But as we have described above, the standard for review in IDEA cases is unique. The district court independently reviews the administrative record and any additional evidence it chooses to receive, and decides the merits based on the preponderance of evidence, giving "due weight" to the IHO's determinations. *See Dist. 21,* 938 F.2d at 715. Although the parties still dispute many facts, we have a 30 volume administrative record and have supplemented it with our own evidentiary hearing. This case is ripe for adjudication. Permitting a full trial on matters already in the administrative record, even disputed facts, would render that hearing a nullity, contrary to the statutory direction to give the IHO's opinion "due weight." *Capistrano Unified School Dist. v. Wartenberg,* 59 F.3d 884, 891-92 (9th Cir. 1995); *A.P. v. McGrew,* 1998 WL 808879 at *3 (N.D.Ill. Nov. 16, 1998); *but see Doe v. Metropolitan Nashville Public Schools,* 133 F.3d 384, 387 (6th Cir. 1998) (holding summary judgment inappropriate if facts are disputed). "Because this appears to be what Congress intended under the Act, we conclude it is the right thing to do, even though it does not fit well into any pigeonhole of the Federal Rules of Civil Procedure." *Capistrano,* 59 F.3d at 892. The IDEA does not require a full trial *de novo.* Perhaps our decision today is better described as judgment on the record, rather than summary judgment. Either way, we proceed to consider the merits.

II. The Placement Decision

The crux of this case is the Least Restrictive Environment (LRE) requirement, 20 U.S.C. § 1412(5), and how it interacts with the district's obligation to provide an FAPE. 20 U.S.C.

§ 1412(1). The IDEA's primary purpose is to ensure that disabled children have access to educational opportunities. School districts are obligated to provide services "reasonably calculated to enable the child to receive educational benefits." *Board of Educ. v. Rowley,* 458 U.S. 176, 207 (1982). This does not, however, mean that the child must receive an optimal education. *Id.* at 191-203. Nor must the district provide services allowing her to achieve at the same level as non-disabled students. *Id.*

Congress left local school authorities wide discretion as to how to achieve this mandate. Courts are not to second-guess pedagogical or educational policy decisions. But Congress did make one clear policy choice, that disabled students benefit from interaction with non-disabled peers and should do so to the maximum extent possible — the LRE requirement. 20 U.S.C. § 1412(5). This does not, however, override the primary obligation to provide educational benefits. A district need not, indeed may not, place a child in a program that does not confer educational benefits simply because it is less restrictive.

Here the parties each claim that their placement is the only one that will provide Beth any benefits. Because the district's obligation to provide an FAPE is paramount, the sufficiency of the district's proposed placement is a threshold question. We must resolve this before even considering whether it is least restrictive. *Rowley,* the seminal FAPE case, defines a school district's obligations as "providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." 458 U.S. at 203. The Court further found

that the lack of concrete substantive standards within the statute was intentional. Congress meant to leave those to the states, so long as the student received some educational benefit. *Id.* at 199.

A. Educational Benefit

First, we discuss the IHO's FAPE analysis. His opinion discusses how the district made "careful and competent analysis that includes reasonable efforts to obtain relevant information needed to develop a beneficial placement." (IHO Op. at 35). Plaintiffs argue that this is a more permissive standard than pronounced by *Rowley*. We disagree. *Rowley* explicitly recognized that the IDEA grants school districts flexibility to deal with a wide range of disabilities. For example, in *Rowley* itself, the Court found that the "instruction and services . . . must approximate the grade levels used in the State's regular education." 458 U.S. at 203. Given Beth's limited abilities, this particular standard would clearly not be appropriate here. The district's experts estimate her mental age as between 12 and 20 months, while plaintiffs' experts place her between 4 and 6 years,[1] and she has a very limited ability to communicate. She cannot possibly comprehend a normal seventh grade curriculum. Consequently, we must use a metric other than regular education grade levels. We must

1. Age-equivalence measures can be misleading. *See D.F. v. Western School Corp.*, 921 F. Supp. 559, 567 (S.D. Ind. 1996). This is particularly true here because Beth's limited communication skills prevent the use of many traditional tests. The wide disparity among the experts' opinions only corroborates this. The administrative record, including testimony from Beth's teachers, aides and therapists, however, creates a sufficiently clear picture of her abilities.

also consider that the scientific and educational communities have only a limited understanding of Rett Syndrome. Because its incidence is so low, there have not been sufficient studies to determine, to any degree of certainty, how to best educate students with this disorder. The IHO stated his analysis in terms of reasonable efforts to research the disability. This makes eminent sense under the circumstances. Where there is no consensus among educators, all a school district can do is review the available literature and then exercise its professional judgment as to how to best educate the student. Doing the research alone, obviously, is not adequate. The district must still comply with all the other statutory requirements. If anything, the IHO's standard requires more of school districts. Instead of simply developing and implementing an IEP according to established pedagogical practices, because so little is known about Rett Syndrome, the district had to conduct independent research prior to developing Beth's IEP. We believe the IHO's standard is an appropriate application of the principles announced in *Rowley* to a disorder such as Rett Syndrome, about which so little is known.

Having approved the IHO's legal standard, we must review his application of it to the facts. He found that the district made sufficient attempts to learn about Rett Syndrome in developing its IEP for Beth. We agree. As we noted above, neither the scientific nor the educational community fully understands Rett Syndrome. The studies completed thus far have been limited in scope and the theories they developed have not been sufficiently tested to reach any authoritative conclusions. Given these limits, the district consulted with some of the most knowledgeable experts available. Plaintiffs make much of the fact that the district agreed to consult an

independent expert, Dr. Joseph Vaal, in developing Beth's IEP, but then did not follow his recommendations. The district, in fact, consulted with multiple "experts."[2] Besides Dr. Vaal, the district also consulted with Dr. Richard Van Acker, who reached very different conclusions. The district's special education teachers, who have experience with cognitive disabilities in general,[3] and Beth's teachers, aides and inclusion coordinators, who have direct experience with Beth, also participated in the process. A district is not obliged to follow any particular one's advice. School officials do not relinquish their ultimate authority to make educational policy decisions by agreeing to consider an independent consultant's opinion. Plaintiffs also complain that the district was uncooperative with her private therapists. Again, we agree with the IHO. Although ideally the district and parents will cooperate in pursuit of the best program for the disabled child, the IDEA does not oblige the school to consult with private therapists. This does not, in and of itself, negate the reasonableness of the district's efforts. We agree with the IHO that the district acted reasonably in developing Beth's placement.

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2. Both parties vigorously attack the opposing experts' credentials and credibility. These are all competent professionals. Their experiences with Rett Syndrome are limited, but given the paucity of research on this disorder, they are among the most knowledgeable available. We give great deference to the IHO's credibility determinations, and he found these witnesses credible.

3. The ELS program administrator has direct experience with four girls who have Rett Syndrome, including one who is currently in the program.

Plaintiffs also challenge the IHO's opinion on the ground that he misapplied the burden of proof. At the administrative level the school district does bear the burden to prove that its proposed IEP is adequate under the statute. *See* 105 ILCS 5/14-8.02(h). But the party challenging the administrative decision bears the burden in the district court. *See Dist. 21,* 938 F.2d at 716.[4] Throughout his opinion the IHO acknowledges uncertainties about the district's program. Plaintiffs characterize this as a finding that the evidence was a "draw," and that this, by definition, means the district failed to carry its burden. This both overstates the district's burden and reads too much into the IHO's statements. The district does not have to prove its placement is pedagogically superior to the parents. The district presented evidence that, based on the available research, its placement is likely to benefit Beth, *i.e.,* is appropriate. This satisfies its burden. That an alternative placement may also confer benefits does not negate the appropriateness of the district's placement. Plaintiffs also attempt to use the IHO's candid discussion of the conflicting

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4. This is the general rule governing review of administrative decisions. There is some debate among the circuits about whether the burden should shift in LRE cases because of the statutory presumption for mainstreaming. The majority of circuits have said no. *See Clyde K. v. Puyallup School Dist. No. 3,* 35 F.3d 1396 (9th Cir. 1996) (collecting cases from other circuits); *but see Oberti v. Board of Educ. of the Borough of Clementon School Dist.,* 995 F.2d 1204, 1218 (3d Cir. 1993) (placing burden on school district regardless of who won below). The Seventh Circuit opinions in this area have cited the general rule, without discussing the LRE question specifically. Because the burden of proof is not decisive here, we decline to definitively join either camp. *See T.H. v. Board of Education of Palatine Community Consolidated School District No. 15,* 55 F.Supp.2d 830, 835 (N.D. Ill. 1999).

evidence to attack his findings. The IHO acknowledged that the parents' experts raised valid concerns about the district's placement, and that the district's responses were not completely satisfactory. This is not the same as saying the district's placement will not benefit the student, just that there are still questions. He explicitly stated that his uncertainty was not due to inadequate evidence from the parties, but rather the limited knowledge we have of Rett Syndrome. No one, least of all lay judges, knows with any certainty what is pedagogically best for Beth. But the IDEA does not require the district to resolve all doubts about its proposed placement. The IHO found, and we agree, that the district's placement is reasonably calculated to benefit Beth. His candor about his uncertainty does not reflect error.

B. Least Restrictive Environment

Plaintiffs maintain that Beth should remain in regular classes at Lake Bluff Middle School because this is the least restrictive environment. But the IDEA only requires mainstreaming to the "maximum extent appropriate." 20 U.S.C. § 1412(5). This language is far from absolute and invites a balancing approach. "[T]he mainstreaming requirement was developed in response to school districts which were reluctant to integrate mentally impaired children and their non-disabled peers. It was not developed to promote integration with non-disabled peers at the expense of other IDEA educational requirements." *Murphysboro,* 41 F.3d at 1168. The IDEA's twin goals, tailoring each child's placement to her special needs and maximizing integration with non-disabled students, are frequently difficult to reconcile, and the statute itself provides little guidance. It does recognize that there are

circumstances where regular education is not appropriate. *See* 20 U.S.C. § 1412(5)(B). The vexing issue is when, and to what degree, segregating a student in special education is permissible.

Again, plaintiffs attack the standard applied by the IHO, arguing that he erroneously used *Rowley* in determining whether the district's placement satisfied the LRE requirement. Plaintiffs are correct that *Rowley* is not the proper standard for LRE analysis. In fact, however, the IHO never reached that question. He found that the parents' placement would not confer educational benefit to Beth and, therefor, could never be appropriate. Because educational benefit is paramount, and the parents' placement (in his opinion) failed this test, he did not consider whether it was less restrictive. We agree that benefit to the student is of primary importance and share many of the IHO's reservations about the parents' placement. But the district is obliged to provide a FAPE, which includes compliance with the LRE requirement, regardless of any proposal from the parents. We must review the district's placement to determine whether it is consistent with law. The statute itself does not prescribe a substantive standard for balancing educational benefits with mainstreaming, so the courts have developed their own. The circuits are split into at least three camps, and neither the Supreme Court nor the Seventh Circuit has indicated a preference among these tests.

The Sixth Circuit has focused on the feasibility of keeping the student in regular education. *See Roncker v. Walter,* 700 F.2d 1058 (6th Cir. 1983). Under this test the court must identify what makes the segregated placement superior, and determine whether those services can feasiblely be

provided in a non-segregated setting. *Id.* at 1063. *Roncker* also identifies three scenarios when special education is proper: (1) the student will not benefit at all from mainstreaming; (2) the benefits from services that cannot feasibly be offered in a mainstream setting may far outweigh any marginal benefits from mainstreaming; or (3) the child may disrupt other students.[5] *Id.* The Fourth and Eighth Circuits have also adopted this test. *See Devries v. Fairfax County School Bd.*, 882 F.2d 876, 879 (4th Cir. 1989); *A.W. v. Northwest R-1 School Dist.*, 813 F.2d 158, 163 (8th Cir 1987).

The Fifth Circuit found that *Roncker* "necessitates too intrusive an inquiry into policy choices that Congress deliberately left to state and local school officials. Whether a particular service feasibly can be provided in a regular or special education setting is an administrative determination that state and local school officials are far better qualified and situated than are we to make." *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1046 (5th Cir. 1989). Instead, it fashioned its own test: "First we ask whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child. If it cannot . . . , we ask, second, whether the school has mainstreamed the child to the maximum extent appropriate." *Id.* Although it emphasized that there is no fixed set of factors to consider, the court identified several that may be relevant at each stage of the inquiry. These include whether the state had taken steps to accommodate the child in regular education; whether the child will receive benefits from regular education; and what effect the handicapped child's

5. Cost may also be a factor in some circumstances, but is not at issue here.

presence has on the classroom environment. *Id.* at 1048-50. The Third and Eleventh Circuits have also adopted this test. *See Oberti v. Board of Educ.*, 995 F.2d 1204, 1215 (3d Cir. 1993); *Greer v. Rome City School Dist .*, 950 F.2d 688, 696 (11th Cir. 1991).

The Ninth Circuit has added yet another analytical framework to the mix. Its multi-factored balancing test includes elements drawn from both *Roncker* and *Daniel R.R. See Sacramento City Unified School Dist. v. Holland,* 14 F.3d 1398 (9th Cir. 1994). The court must consider "(1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect [the disabled student] had on the teacher and children in the regular class; and (4) the costs of mainstreaming [the disabled student.]" *Id.* at 1403.

The Seventh Circuit has not adopted any of these tests. *See Monticello School Dist. No. 25 v. George L.*, 102 F.3d 895, 905 (7th Cir. 1996) (discussing both the *Roncker* and *Daniel R.R.* tests, without endorsing either). Although it did not cite *Holland,* the *Monticello* court's analysis included many of the same factors weighed by the Ninth Circuit. Our court of appeals' most recent LRE decision deferred to the IHO's finding without discussion, and consequently did little to clarify which test applies in this jurisdiction. *See Board of Educ. of LaGrange School Dist. No. 105 v. ISBE (LaGrange),* 184 F.3d 912 (7th Cir. 1999). At least one sister court within this circuit considered a *Holland*-type balancing analysis, and ultimately reconciled it with *Daniel R.R.* "The Daniel R.R. test states the standard in terms very close to the statutory terms. The Holland factors identify more

specific levels of inquiry for applying the more general Daniel R.R. standard. . . . The court will apply the two part test stated in Daniel R.R. and Oberti, but will organize its discussion in terms of the four Holland factors." *See D.F. v. Western School Corp.*, 921 F. Supp. 559, 567 (S.D. Ind. 1996).[6]

We find the *Daniel R.R.* test superior, particularly as applied in *D.F.* It tracks the statutory language more closely than does *Roncker,* and, in our opinion, strikes a better balance between the competing policies. First, we agree with the Fifth Circuit that basing a test on "feasibility" is too intrusive. Courts are poorly suited to decide what can or cannot be done effectively in a classroom. The IDEA leaves local officials discretion in implementing the statute's goals, and feasibility requires policy determinations more appropriately left to educators than to judges. Second, feasibility places too much emphasis on what services can be delivered and not enough on what the student actually learns. Some services may be feasible in regular education, but more effectively delivered in a special education setting. Although Congress has expressed a preference for integration, its primary goal, and our foremost consideration, is still assuring educational benefits to the child. *Daniel R.R.* focuses first on whether the education is satisfactory, and then on whether the child could have greater exposure to non-disabled students. This gives each its appropriate weight. We do not find anything in *Holland* objectionable. The factors considered are all relevant to a determination of whether the placement is both appropriate and least restrictive. But we agree with the Fifth

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6. We note that the *D.F.* case predates *LaGrange,* but as we mentioned above, that opinion does not appear to settle on any particular test.

Circuit that the factors must be case-specific. *Daniel R.R.* draws on the statutory language to set a general framework — a test — and then examines several factors in its application of that test. *Holland* utilized some of these factors, as well as some additional ones appropriate in that particular case. *D.F.* properly characterized these as the more specific inquiries called for by the *Daniel R.R.* test, and used them to organize its analysis. We shall do the same. Because the Seventh Circuit has not adopted either test, however, we will evaluate Beth's situation under *Roncker* as well.

1. The Daniel R.R. Test

We first consider whether Beth can receive a satisfactory education in a regular classroom setting. After reviewing the steps the district has taken to accommodate Beth's disability, the educational and non-educational benefits she receives, and Beth's impact on the classroom environment, we conclude she will not.

First, the district has made adequate attempts to accommodate Beth with individualized services. Beth has two teachers' aides and an inclusion facilitator who work with her. They have developed a special curriculum for Beth to follow, focusing on the goals stated in her IEP, including special books with laminated pages, puffed-up pictures and modified text. The district also provided numerous assistive technologies for Beth, including jelly-bean switches, One Step Communicator, Step-by-Step Communicator and Intellikeys.[7]

7. These devices allow Beth to communicate preprogrammed messages in various ways, such as by activating a switch.

Appendix B

Teachers and other students have received special instruction in how to communicate with Beth. The school has also modified her schedule, such as scheduling extended bathroom breaks into her day. The IHO found that these measures constituted an adequate attempt by the district to accommodate Beth, and we agree.

Next we consider the educational benefits she will receive. There is a stark factual dispute about the level of progress Beth has made in her current placement. Plaintiffs contend she has progressed dramatically, despite inadequate services from the school. Defendants contend that she has progressed little, if not regressed, despite their herculean efforts. The IHO struggled with the conflicting evidence from Beth's teachers and private therapists, but ultimately decided it was not necessary to reconcile their differing views. Our independent review shows that Beth's progress has been inconsistent. Due to the nature of her disability, Beth's progress must be measured in fine increments and involves a large degree of subjectivity. She has shown occasional improvement in certain areas, but she has appeared to regress in others. She also does not duplicate learned skills regularly, but sporadically. This is not to diminish what she has accomplished. But we believe, at least we hope, she can learn much more in a better setting.[8] Moreover, we agree with the IHO that whatever benefits Beth has received are not attributable to regular education, but from what is more accurately described as special education within a regular classroom.

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8. We describe the proposed setting and its benefits in more detail in the section applying the *Roncker* test.

Appendix B

Beth has severe cognitive limitations. At the middle school level the material in the regular curriculum is too complex and the pace too quick for Beth to comprehend. She will gain no benefit from it. The IDEA requires that the school provide sufficient supplemental services to allow the disabled student to benefit from a regular education. It does not, however, require changes so extensive that the curriculum becomes unrecognizable. *Daniel R.R.*, 874 F.2d at 1048. This is what would be necessary for Beth, who is working on a completely different skill set from her non-disabled peers. Her IEP focuses on tasks such as establishing eye contact with people who speak to her, responding to verbal commands within 10-15 seconds, grasping items with her hands, bringing food to her mouth with modified utensils, choosing among objects or pictures and activating her assistive technology. Beth cannot recognize letters.[9] While her peers have begun reading novels, Beth utilizes books written at a pre-school level, with emphasis on pictures and repeated phrases. While other students learn about credit cards and balancing their checkbooks, Beth learns to sort food items from clothes.

She does not participate in the class lectures and discussions, but works one-on-one with her aide, effectively segregated from the rest of the class. The district has designed exercises for Beth that are parallel to what her peers are studying. For example, when the class studied the composition of clouds, Beth looked at pictures of clouds. Beth misses a substantial portion of instructional time. Middle school

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9. Many experts believe girls with Rett Syndrome are incapable of grasping any symbol-based system, such as the alphabet.

students switch classrooms six or seven times per day, with three minutes allotted between periods. Transporting and setting up Beth's equipment and support items takes considerably longer. She frequently falls asleep in school, has 20-30 minute scheduled toilet breaks, and is frequently absent.[10] All these factors inhibit Beth's ability to keep pace with the class, even with her parallel curriculum. In an attempt to maintain the parallelism, when the class moves on to the next unit, so does Beth, regardless of her progress. Plaintiffs argue that the teachers' failure to integrate her into the classroom activities demonstrates the inadequacy of the district's efforts to accommodate her. Because the lessons are mostly lectures, Beth is working on a completely different skill set. There is little a teacher could do to involve Beth that would not detract from the other students.

We also consider any non-academic benefits Beth might derive from a regular education setting. Our preference for mainstreaming is based, in part, on the belief that exposure to non-disabled students allows the disabled student to model their speech and behavior. Beth's private therapists report that she does imitate some behavior models observed from her non-disabled peers. Plaintiffs maintain that Beth must remain in a language-rich environment, that she is motivated to communicate by exposure to non-disabled children and that her communication skills will regress in the ELS program, where she will primarily be with other non-communicative

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10. For example, she misses one day per week to attend private therapy. She was also absent approximately 25% of the remaining days.

autistic children.[11] The district's experts maintain that girls with Rett Syndrome are pre-imitative — their development is arrested at under one year, before the point at which they will imitate behavior models. We certainly agree that it is important for Beth to continue exposure to non-disabled students, but we are also mindful that it may be of limited value for imitation purposes. Moreover, we do not believe she will get that kind of contact in a regular middle school setting. As discussed above, because of the curriculum differences, Beth necessarily sits apart from the other students, working with her aide, on her own lessons. The record reflects that Beth's interaction with other students has declined as her peers have advanced grade levels. In middle school, where lectures are primarily used, there is minimal opportunity for interaction with other students during academic classes.

Lastly, we consider the effect of Beth's presence on the regular education environment. This generally falls into two categories, her effects on the other students and on the teacher. First, does the disabled student cause any disruptions in the classroom? Beth's aides must use special tones and inflections to maintain her attention, which has a tendency to distract other students. Beth also periodically makes loud vocalizations. She regularly falls asleep and has occasionally vomited in class. Because of complaints from other students

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11. Plaintiffs also argue that Beth benefits socially from being in a regular classroom; that she has progressed through school with these same children, some of whom have become her friends. Although this may be desirable, it is not a factor under the IDEA. The district is obligated to integrate her with non-disabled students so that she may be exposed to language and behavior models, not necessarily with her friends.

and parents, Beth is often removed from the classroom when tests are administered. This is unfair to the other students in the class. Nonetheless, this problem appears to be infrequent and relatively mild, so we do not ascribe much weight to it. Second, does the student require so much attention from the teacher that it detracts from the other students? This is more problematic. Because Beth is on a separate curriculum from the other students, the classroom teacher cannot work with her and with the rest of the class simultaneously. This is particularly so in middle school, where teachers tend to use a lecture format and the classes are only 42 minutes long. The teacher cannot spend time working with Beth on her separate lessons without neglecting the other students. Any time the teacher does spend with Beth is taken away from the rest of the class.

Having determined that Beth cannot be satisfactorily educated in regular education, we turn to the second prong of the *Daniel R.R.* test. The district's proposal also mainstreams Beth to the maximum extent possible. It includes "reverse mainstreaming," where non-handicapped students are brought into the special education classroom to interact with the special education students, and also integrates her at lunch and other non-academic activities, such as art, music, lunch and field trips. These opportunities will allow Beth the non-educational benefits discussed above, such as modeling other students and motivating her to communicate. But putting Beth in a regular classroom for academic subjects, as we have repeatedly emphasized, would not benefit her.

Considering all these factors, we agree with the IHO that regular education will not satisfactorily benefit Beth. The school has made ample attempts to accommodate her, but her condition requires changes that make the curriculum unrecognizable. She will not benefit academically from the regular curriculum, and non-educational benefits will be limited. She will also compete for the teachers' attention, detracting from the other students. Placing Beth in a regular classroom provides nothing but the chance to associate with non-disabled students. *See Daniel R.R.*, 874 F.2d at 1050. The statutory presumption for mainstreaming is overcome.

2. The Roncker Test

First, we consider what makes the ELS program superior. Quite simply, it provides Beth with more direct contact with teachers, and teachers who are trained and experienced in dealing with cognitive disabilities. In either placement, Beth has an aide with her at all times. But this is not a substitute for contact with the teacher. Here, she can receive one-on-one contact without detracting from other students. Morever, the ELS teachers are specially trained to deal with children who have cognitive disabilities. The administrator who runs ELS has worked with four Rett Syndrome students, and there is currently one other such girl in the program. Although the district can certainly train Beth's teachers about Rett Syndrome and how to use Beth's assistive technology, this does not equate to the training and experience of a special education teacher. Special education is also more conducive to systematic instruction. Rather than attempting to keep pace, even in modified form, with her non-disabled classmates' lessons, Beth can repeat skills until she learns

them. The district's professional educators believe this is the most effective way for girls with Rett Syndrome to learn, and judges should not second-guess them on educational methodology. Another advantage is that in ELS, Beth would not have to move classrooms every period. Because of her restricted mobility and special equipment, this takes her much longer than the three minutes allotted between classes in the regular middle school, reducing the time available for instruction. Finally, ELS allows the school to incorporate physical therapy into Beth's program. This is essential to help her maintain her mobility as her Rett Sydrome progresses.

Turning to the second prong of the test, these advantages cannot be feasibly duplicated in a regular education setting. The classroom teacher would have to develop two distinct lesson plans, one for Beth and another for the rest of the class. Any time spent working with Beth would be time taken away from the other students' instruction. The school would have to assign a second teacher to the classroom specifically to deal with Beth, which brings us back to the scenario of segregated special education within a regular classroom. It is one thing to modify the curriculum to accommodate the disabled student, to provide supplemental support, or to emphasize the simpler skills, but Beth will gain nothing from listening to a middle school lecture. She uses unrelated materials and is working on a completely different skill set.

The rest of the class cannot wait for Beth to master a particular skill before moving on to another lesson. Beth could not keep pace with the class under any circumstances; she would also miss time each period for private therapy, physical therapy, additional absences and setting up her equipment. The need

to "move on" to the next unit with the class makes it impossible to use the systematic approach. Under this standard, as well, special education is the more appropriate placement for Beth.

Ultimately, this is not really a choice between regular and special education, but between two forms of special education. Although Beth currently sits in a regular classroom, she is effectively segregated from the other children. Her cognitive limitations do not allow her to participate in the regular instruction — an aide works with her one-on-one and the lessons are completely different. Beth does not receive a modified curriculum, but a parallel one. She will have no meaningful interaction with her non-disabled peers during academic classes. This is not mainstreaming in any real sense, but special education in a regular classroom. Consequently, we must conclude that the IHO was correct in his finding that it is not a viable, less restrictive placement for Beth. In part, this is also a methodological dispute. The district and its experts believe in a systematic approach to educating Beth, focusing on repetition. Beth's parents and their experts believe a language-rich environment is more important. This is a pedagogical decision, not a legal one. It is better left to the educators, not to the courts.

III. Reimbursement for Private Therapy

If a school district fails to provide an FAPE, a parent may, under certain circumstances, unilaterally secure the necessary services and seek reimbursement. This is not one of those cases. The district already paid for an independent evaluation by Dr. Vaal. It does not need to pay for another

evaluation. Defendants have provided a program which satisfies the IDEA, *i.e.*, is reasonably calculated to confer educational benefit. It is not required to pay for Beth's private therapy as well.

IV. ADA and § 504 Claims

Although these claims are not identical, they both require proof of intentional discrimination or failure to provide the most reasonable modifications. *See Washington v. Indiana High School Athletic Ass'n,* 181 F.3d 840 (7th Cir. 1999). It is not enough to show that the district made an improper placement, or that the attempted accommodations proved inadequate. These are not "educational malpractice" claims. *Smith v. Special School District No. 1,* 184 F.3d 764, 769 (8th Cir. 1999). There must be "gross misjudgment or bad faith on the part of school officials." *Id.*

There is no such proof here. Instructing district officials to maintain records in anticipation of a due process hearing does not equal bad faith. Plaintiff may quarrel with the district's placement decision, but there is no evidence that the district was trying to segregate Beth because of animus towards the disabled. To the contrary, it is apparent district officials believed, in good faith, that ELS would provide the best education for Beth. And although the district may not have cooperated with Beth's parents and private therapists to the degree that they would have liked, there was no conspiracy to make Beth fail. In short, there is no evidence of intentional discrimination here.

Appendix B

CONCLUSION

For the reasons above, judgment is granted in favor of defendants on all counts.

James B. Moran
JAMES B. MORAN
Senior Judge, U.S. District Court

Sept. 10, 2001

APPENDIX C — DECISION AND RULINGS IN THE MATTER OF ELIZABETH B. AND LAKE BLUFF SCHOOL DISTRICT 65 DATED MAY 26, 2000

IN THE MATTER OF:

Elizabeth B

And

Lake Bluff School District 65

DECISION AND RULINGS

Procedural Background

The Hearing in the above captioned matter commenced on Monday October 25, 1999. Additional sessions of the hearing took place on the following dates:

Wednesday October 27, 1999	Wednesday December 15, 1999
Friday October 29, 1999	Wednesday January 19, 00
Monday November 1, 1999	Wednesday February 2, 00
Wednesday November 3, 1999	Wednesday February 9, 00
Wednesday November 10, 1999	Monday February 28, 00
Monday November 22, 1999	Wednesday March 1, 00
Wednesday December 1, 1999	Monday March 13, 00
Wednesday December 8, 1999	Friday March 17, 00
Monday December 13, 1999	Monday March 20, 00

All of the above sessions of the hearing in the above captioned matter, with the exception of the last one, on Monday March 20, 00, took place at the Lake County High Schools Technology Campus, 19525 W. Washington Street, Grayslake,

Illinois. The last session took place at the offices of the Lake County Regional Office of Education, 800 Lancer Lane, Grayslake, Illinois. The parties were provided full opportunity to present evidence and testimony at the hearing. The witnesses were sworn. At the final session of the hearing the Hearing Officer, with the agreement of the parties, arranged to receive post-hearing briefs from the parties on Friday April 28, 00. Subsequently the parties made a joint request for an extension of one week, until May 5,00, which the Hearing Officer granted.

The Hearing Officer received his notice of appointment in this case almost three years ago on July 17, 1997. On August 8, 1997 he issued two pre-hearing rulings. The first concerned determination of the stay-put placement for Elizabeth B student in this case (hereinafter the Student). The second addressed the issue of whether the Student's parents, Mr. Thomas and Ms. Susan B (hereinafter the Parents), had to allow Lake Bluff School District 65 (hereinafter the School District) to observe the evaluation of the student by a mutually agreed upon evaluator. After the Hearing Officer issued these rulings an extended period of time elapsed during which the parties waited for the results of the evaluation, experienced delays related to diverse factors, and engaged in lengthy negotiations. The Hearing Officer contacted the parties regularly throughout this period for status updates. It was not until mid April of 1999, however, that the parties informed the Hearing Officer a hearing would probably take place, and in June they agreed on a pre-hearing conference date of July 8, 1999.

Appendix C

Toward the beginning of November of 1998 counsel for the School District underwent surgery, which required about a month and a half of recovery time. Before she entered the hospital, the parties separately informed the Hearing Officer that negotiations had broken down, but that counsel for the Parents intended to prepare another proposal for the School District to consider.

This is where matters stood in January of 1999, at which time the Hearing Officer accompanied one of his undergraduate students at the Illinois Institute of Technology to a meeting with a professor at another university in the Chicago area. The Hearing Officer arranged this meeting, which lasted for about an hour, in connection with an undergraduate project he was directing in the area of assistive technology for individuals with mobility impairments. It later turned out that when the Hearing Officer received the School District's list of witnesses several days before the pre-hearing conference of July 8, 1999, the name of the professor with whom the Hearing Officer and his undergraduate student had met appeared on the list as the School District's expert consultant. When the Hearing Officer informed the attorneys for the parties of this at the July 8, 1999 pre-hearing conference he said that he did not consider it sufficient grounds to withdraw from the case. In this regard the Hearing Officer noted the short duration of the meeting, the absence of any follow-up meetings, and the absence of any prior professional or social contact between himself and the School District's expert consultant.

Appendix C

The next day, July 9, 1999, the Hearing Officer received a fax communication from counsel for the Parents requesting that he withdraw from the case. The Hearing Officer allotted counsel for the School District a week to respond to the request of counsel for the Parents, and then granted counsel for the Parents a week to answer the School District's response. On July 30, 1999 the Hearing Officer issued a ruling in which he denied the request of the Parents that he recuse himself. The Hearing Officer accompanied the ruling with a memorandum explaining the reasons upon which he based it. Shortly thereafter the Hearing Officer and the parties communicated to establish the date for the commencement of the Hearing, and a number of additional dates. Over the course of the hearing, it became necessary several times for the Hearing Officer to schedule more sessions to allow the parties to present their respective cases in their entirety. The hearing began on Monday October 25, 1999 and concluded with the filing of post-hearing briefs by the parties on Friday May 5, 2000.

Factual Summary

Insofar as the Hearing Officer can determine, neither the School District nor the Parents contest any of the statements contained in the following Factual Summary. The Student is a twelve-year-old girl currently enrolled in a fifth grade class in the School District. The Student has Rett Syndrome, a condition which appears only to affect girls, characterized in the American Psychological Association Diagnostic and Statistical Manual IV (DSM4) as a form of autistic disorder involving multiple severe to profound disabilities in the areas of motor functioning, communication, and cognition.

Appendix C

The Student's Parents, her private therapists, and the staff of professional educators who work with her at school all estimate her motor abilities to lie within the range of five to seven months. The Student's levels of functioning in the areas of communication and cognition are major points of controversy in this case. The Student cannot speak. This disability, combined with her severe motor deficits, make it unfeasible to administer standardized tests to determine her communicational and cognitive levels. The professional educators who work with the Student at school estimate her levels in these areas, on the basis of their observations of her, at twelve to twenty months. In contrast, the Parents and the Student's private therapists estimate, on the basis of their observations of the Student, that her communicational and cognitive abilities are much higher. In this connection, one of the Student's private therapists regards her levels of communicational and cognitive development, in some key areas, to approach those of a four to six year old.

Girls with Rett Syndrome tend to undergo four stages. Stage one (onset 6 to 18 months) involves a slowing down of development after a normal first six months of infancy. The symptoms of slowed down development in stage one, however, tend to be non-specific, and seldom definitive, in and of themselves, that a child has Rett Syndrome. In stage two (onset 1 to 3 years) a child undergoes a period of rapid decline (in some cases lasting only several weeks) in which she loses previously acquired cognitive, communicational, and motor abilities. Intellectual function generally falls during this period into the severe to profound range of mental retardation, and the ability to speak disappears. In stage two a child with Rett Syndrome often evidences pronounced lack

of interest in people and the environment, suggestive of autism. Usually she will also begin to exhibit repetitive stereotypic hand movements throughout the day that prevent her from using her hands for purposive activity.

In stage three (onset 2 to 10 years) the social interaction of children with Rett Syndrome begins to improve. The children show more awareness of their surroundings and often appear to be making efforts at non-verbal communication through means such as eye gaze, pointing, bodily movement, facial expressions, and (non-verbal) vocalizations. Stage four (onset 10+ years) involves pronounced deterioration of motor functioning, however cognition, social awareness, and the ability to focus attention do not appear to decline, and even may improve.

Rett Syndrome is a low incidence condition affecting only one out of every ten thousand girls. In this regard, all of the expert witnesses, or professional educators involved in working with the Student, called to testify by either party in this case, have engaged in research with, or provided educational services for, only a small number of children with Rett Syndrome over their entire careers (Tr. 10/25 pp. 176-77, 10/29 pp. 220-22, 11/1 p. 103, 11/10 p. 9, 11/22 p. 10, 1/19 pp. 63, 2/9 p. 16). Although described originally in the 1960's by an Austrian physician, Rett Syndrome was not classified as a distinct form of disability until 1983. Discovery of the gene associated with Rett Syndrome has been reported recently, but many important questions relative to the condition remain under explored. In this regard, no comparative studies exist on the topic of effective educational approaches to employ in the classroom for developing the communicational and cognitive abilities of children who have Rett Syndrome (Tr. 3/20 pp. 111-12, 195).

Appendix C

The features described above, that characterize the third stage of Rett Syndrome, clearly apply to the Student in this case. She expresses interest in people, especially people's faces. She smiles and laughs, responds positively to music, and has definite likes and dislikes concerning food, which she expresses through eye gaze, body movements, non verbal vocalizations, pointing, and facial expressions. The Student, however, primarily communicates through her eye gaze. For this reason, the educational efforts to help her develop her communicational and cognitive abilities rely to a large extent upon computer based assistive technology equipment which presents her with arrays of pictures on an adaptive keyboard among which she may focus her eye gaze to make a choice. The Student is also capable of activating a switch with her hands to make her choices, however, this has become increasingly difficult for her in the past year, indicating that she may be about to undergo the significant losses of motor function associated with the fourth stage of Rett Syndrome. The Student currently has scoliosis and wears a back brace. She has very limited use of her hands, needs one on one assistance when walking, and spends most of her day in a wheelchair.

Since the Student was three years old, the Parents have arranged weekly sessions for her with a developmental therapist who specializes in working with children who have severe to profound cognitive disabilities, a speech and language therapist, and a physical therapist. In addition, outside of school the Student receives music therapy and horseback riding therapy every week. The Parents make extensive efforts to assure that the Student has a meaningful place in the life of her family and community. The Student's siblings (none of whom is either cognitively or physically

disabled) play with the Student, from which she has learned how to share and take turns. The Parents invite children from the Student's school and church to their home to play with her. Currently the Student belongs to a Girl Scout troop, attends religious school, and plays in a band. The Parents, who attend many gatherings of friends and social events in their community, include the Student in a great many of them.

In 1990, at the age to two, the Student began to receive educational services from the North Suburban Special Education District (NSSED) (hereinafter, the Co-op), a special educational cooperative to which the School District belongs. The Student was diagnosed with Rett Syndrome the following year (1991). Prior to 1991 no children with Rett Syndrome had ever been enrolled in the School District. The Student entered the Co-op's Early Childhood Program for the 1991-92 school year, where she remained through the 1992-93 and 1993-94 school years. The Student participated in the program with the assistance of a one on one aide, took part in adaptive physical education, and received the related services of speech/language therapy, occupational therapy, and physical therapy. During the 1994-95 school year the Parent's strongly urged, and the School District agreed to, placement of the Student in a regular education kindergarten classroom, with continuation of the one on one aide, adaptive physical education, and related services provided in the Co-op's Early Childhood Program. The Student's placement in a regular education classroom continued in first grade (1995-96) and second grade (1996-97). In second grade the School District added the services of an inclusion facilitator on the staff of the Co-op to the Student's program.

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The School District has now worked with the Student for nearly ten years. Its conclusions, based upon this experience, however, are intensely disputed matters between the parties in this case. At the annual IEP conference in June of 1997, the School District communicated to the Parents its judgment that, based upon the experience of School District and Co-op staff in working with the Student, her "needs, including competence in such areas as communication, reliable choice making, functional skills, socialization, and fine and gross motor [functioning] preclude" placement in a regular education class (S.D. ex. 99). The School District further stated that, in its opinion, "supplementary aids and services in a regular education classroom are insufficient in terms of the duration, intensity, and frequency needed" (S.D. ex. 99). In light of the above judgments, the School District proposed a self-contained special education placement for the Student in the Co-op's Educational Life Skills (ELS) Program. The Parents rejected this proposal emphatically as inappropriate. They contended instead that the appropriate program for the Student in the least restrictive environment was an inclusive program in a regular education classroom.

In August of 1997 the Hearing Officer issued a ruling in response to a request from the Parties for a stay-put determination in regard to the Student's placement. The School District maintained that, under a correctly decided stay-put determination, the Student should remain in the second grade class which was her placement at the time of the IEP meeting in June of 1997. In contrast, the Parents contended that the correct stay-put placement for the Student would call for normal grade to grade advancement during the 1997-98 school year to a regular education classroom in a new school

within the School District. The Hearing Officer upheld the position of the Parents. Accordingly, the Student's regular education placement, with a one on one aide, adaptive physical education, and supplementary services has continued through third and fourth grade, up to the present time, at which the Student will soon complete her fifth grade year of school. As indicated above, during this period the parties agreed to an evaluation conducted by a mutually acceptable evaluator. In addition, during the Student's third grade year she was absent from school for extended periods owing to medical problems unrelated to her condition of Rett Syndrome. Throughout the 1997-98 and 1998-99 school years the parties negotiated continuously to resolve their disagreement over the Student's placement.

The IEP prepared for the Student at the end of second grade, in June of 1997, remained as her working IEP up to April of 1999 when the parties agreed upon a revised set of goals and objectives. The parties continued to disagree, however, about the appropriate program to implement for the Student. The School District maintained its position that in virtue of her condition of Rett Syndrome the appropriate placement for the Student in the least restrictive environment is the ELS Program operated by the Co-op. The Parents insisted, to the contrary, that the Student's needs could only be appropriately addressed in an inclusive regular education placement, with a one on one aide, and appropriate supporting services. Accordingly, the School District and the Parents contacted the Hearing Officer on June 9, 1999 to arrange for a pre-hearing conference and due process hearing to take place.

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Position of the School District

The School District contends that the placement it has proposed for the Student in the Educational Life Skills (ELS) Program meets and exceeds its responsibility under the Individuals With Disabilities Education Act (IDEA) to provide the Student a free appropriate public education in the least restrictive environment. The proposal to place the Student in the ELS Program, says the School District, directly addresses her educational needs, which, the School District contends, it has assessed in great depth over almost six years of attempting to educate the Student in a regular classroom environment since her kindergarten year of school in 1994-95. Despite extensive efforts to make the Student's regular education placement succeed, the School District avers that the Student has made almost no progress in achieving the goals and objectives contained in her IEP, developed at the end of second grade, which remained in effect until April of 1999, in the critical areas of communication and cognition.

This lack of progress, which, the School District maintains, is documented clearly and unmistakably in the case record, resulted even though the School District undertook numerous measures to adapt the regular education curriculum for the Student. In this connection, staff of the Co-op and the School District, such as the Co-op's inclusion facilitator and speech and language therapist, testified that they devoted many hours to planning, designing, and developing simplified educational materials for the Student with subject matters that related in diverse ways to the contents of the regular education curriculum for the Student's non-disabled peers. School District staff, such as the Student's current one on one aide, who worked directly with the Student, testified, however, that in all but a

few cases the materials did not succeed in engaging the attention and interest of the Student. In this regard, the Student's current one on one aide expressed the opinion that despite the extensive efforts to simplify the subject matters of the materials, they remained far beyond the Student's ability to comprehend them.

School District and Co-op staff who worked closely with the Student testified that even when they succeeded in focusing the attention of the Student upon educational materials they found the Student's eye gaze, which is her principal means of communication, very difficult to interpret. In this regard, the Co-op's inclusion facilitator testified that staff who work with the Student typically will attempt to have the Student follow up her eye gaze by touching an object, or utilizing some other means of making a choice. Array's of choices, the Co-op's inclusion facilitator said, typically consist of two to three pictures or icons, because it becomes too difficult to read her eye gaze with larger arrays. The Student's current one on one aide and the Co-op's speech and language therapist, who has worked with the Student for over four years, both characterized the Student's communication by way of eye gaze as "inconsistent" from the standpoint of the above methods. They also testified that the Student's modes of expressing her basic wants and needs - e.g. in regard to toileting - by way of vocalizations, facial expressions, gestures, movements, and other means - have become increasingly inconsistent this past year. All of the School District and Co-op staff directly involved with the Student's program who testified at the hearing stated that they have observed no significant improvement in the Student's abilities relative to communication and cognition during the respective periods of time they have worked with the Student.

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Based upon the above mentioned experiences and observations of School District and Co-op staff who have provided educational services to the Student, the School District concludes that the only kind of placement from which the Student would benefit must include the presence in the classroom of a special education teacher trained in educating children with severe to profound cognitive disabilities. Such a trained professional educator, says the School District, working with the Student in a small self-contained classroom, would be far better able and qualified than would a one on one aide in a regular classroom to help the Student direct her focus of concentration and avoid becoming distracted in the course of various educational activities related to communication. A trained professional educator, specializing in severe to profound cognitive disabilities, the School District contends, would have far greater resources of experience and knowledge than would a one on one aide to draw upon both for the purpose of interpreting the Student's eye gaze, and for making decisions about how to follow up responses elicited from the student in ways that facilitated further communication.

The ELS Program, notes the School District, provides for the presence in the classroom of a special education teacher trained to provide services to children with severe to profound cognitive disabilities. The ELS class would be small, with only six to eight students, says the School District. Furthermore, in the School District's opinion, the ELS Program would address the Student's multiple disabilities, which are both cognitive and physical, in an especially effective way because the program calls for professional educators in diverse disciplines to work together directly within the Student's classroom in close coordination to help the Student achieve her IEP goals and objectives.

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The School District recognizes the importance of interaction with non-disabled peers as a component of the Student's educational program. In this regard, notes the School District, the ELS program includes ample opportunities for students with disabilities to interact with non-disabled students. Such interaction can take place, says the School District, in the ELS classroom itself through regular visits of non-disabled students on a volunteer basis. These volunteers, the School District notes, would receive special preparation beforehand concerning the Student's assistive technology equipment, techniques to engage the Student, and information for interpreting the communicational significance of her behaviors. In addition, says the School District, the Student would continue to be mainstreamed for lunch, and there would be opportunities for her to interact with non-disabled peers through adaptive physical education, as well as on field trips.

The School District points out that it first recommended the ELS Program for the Student in her IEP toward the end of her second grade year of school, at which time the School District had sought to educate the Student in regular education placements for three years, in kindergarten, first grade, and second grade. The School District and Co-op staff who worked with the Student over this period, particularly during first and second grade, says the School District, all formed the opinion that a regular education placement, with the services of a one on one aide, was inadequate to address the Student's needs in virtue of her severe to profound cognitive disabilities. Instead, says the School District, its staff, as well as Co-op staff members, concluded that an educational program, from which the Student might benefit, would require the

presence in the classroom of a professionally trained special education teacher to work with the Student throughout the school day. Such a requirement, the School District avers, while readily met in an ELS classroom cannot be included reasonably in a regular education placement for the Student. Furthermore, maintains the School District, during first and second grade it became evident that the severe nature of the Student's cognitive and communicational disabilities precluded meaningful participation on her part in the regular education academic curriculum. The gap between the Student's capabilities and the content of the regular education academic curriculum, notes the School District, increases even more with each advancing school grade.

The School District emphasizes that it has based its conclusion that the Student's educational needs cannot be met appropriately in the regular education environment, even with supplementary aids and services, upon its experiences during nearly six years of extensive efforts to make the Student's regular education placements succeed. In this connection, the School District notes the testimony presented at the hearing by the Co-op's inclusion facilitator, who stated that she began during the Student's second grade year continuing effort in developing and implementing an inclusive regular education program for the Student. The Co-op's inclusion facilitator, who, the School District points out, holds a masters degree in technology and education, testified that she originally worked a great deal with the Student directly in order to become acquainted with her, and to understand the nature of her educational needs. In this regard, she stated that she stayed in the Student's class, with the Student's current one on one aide, the first week the current one on

one aide was on the job. According to the inclusion facilitator's testimony, she then shifted more to a role of supporting the efforts of other staff involved in the Student's program. This, she related, involved suggesting ideas to them about how to facilitate inclusion for the Student, and also bringing diverse educational materials and opportunities to their attention, such as conferences, workshops, and articles. The co-op's inclusion facilitator related that she meets once a week with the Student's classroom teacher. She also said that her efforts to provide the above kinds of support were aided by frequent consultations with the School District's expert consultant about various materials and techniques that might work in the case of the Student. As an estimate of the amount of time she devotes weekly to the Student's program, the inclusion facilitator placed the number at ten to twelve hours.

The School District notes that, as part of its efforts to implement the Student's regular education program, the Co-op's inclusion facilitator and School District staff members directly involved in working with the Student met on a monthly basis. In addition, the School District points out, its staff also had regular meetings with the Student's mother, at which she often provided information and suggestions, which the School District always considered, and frequently incorporated into the Student's program. The School District states that the Student's mother observed the Student in her classroom, and that the Student's private providers of educational services had the opportunity to do so as well. On one occasion, during the student's second grade year, the School District notes, the Co-op's inclusion facilitator and speech and language therapist observed the Student in a therapy session that the Student's private speech and language therapist conducted in her office.

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The School District points to its diverse efforts to include the Student in the regular education classroom in an educationally beneficial manner, given the nature of her disabilities. In this regard, the Co-op's inclusion facilitator testified about the preparation by School District staff of adapted books, whose subject matters corresponded to units of study in the regular education curriculum. She testified that such preparation first involved selecting very simple children's books that School District staff thought might attract the Student's interest. The staff then, said the Co-op's inclusion facilitator, cut and pasted the books to produce even more simple texts that contained illustrations, a single line repeated on each page, and Velcro figures, letters, or numerals which the Student could grasp. The Student's one on one aide and fourth grade teacher each testified that the Student participated in field trips with her class, and was included in group projects. In addition, the Student's one on one aide described various efforts on her part to encourage the Student's regular education classroom peers to interact with her during recess, lunch, and a period of the class day referred to as "Drop Everything and Read." The Student's fourth grade teacher related, in this regard, that she engaged the class in an exercise by the name of "Circle of Friends," This exercise, she said, was intended to sensitize the student's regular education peers to the network of social relationships of which they are part, and to elicit their own suggestions concerning ways to include the Student in classroom activities.

The Co-op's inclusion facilitator and speech and language therapist described diverse computer based assistive technology devices to help the Student develop her communicational abilities. One of the devices they described called the Macaw is programmed daily by the Student's mother with eight

responses to different questions that might be asked by someone who speaks to the student. The Macaw provides an opportunity for the Student, the Co-op's speech and language therapist related, to share with others current information about herself, such as her latest activities with her family, during periods such as lunch or recess. Other devices that serve related purposes, the Co-op's inclusion facilitator and speech and language therapist described, are called jelly bean switches, the Big Mac, the One Step Communicator, and the Step by Step Communicator. Jelly bean switches, as described by the Co-op's inclusion facilitator and speech and language therapist, have pictures, or word icons attached to them that enable the Student to express her choices in circumstances such as lunch or snack time. The Big Mac, the Co-op's speech and language therapist explained, is a simple voice output device that allows for recording of messages up to twenty seconds, while the One Step Communicator, and the Step by Step Communicator are programmed with brief verbal communications, such as greetings, and activated easily. This facilitates communication in rapid encounters, such as when passing through corridors in school, said the Co-op's speech and language therapist. The Co-op's inclusion facilitator and speech and language therapist both noted that the School District makes extensive use of an adaptive computer keyboard called Intellikeys which works with accompanying software. When using the Intellikeys keyboard, they said, the Student's choices, through eye gaze, or other means, from an array of pictures overlain on a computer keyboard, bring to the computer screen a wide range of information in different forms, such as written text, illustrations, photographs, and numbers that are intended to immerse the Student in an environment of language and literacy.

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The Student has generated poems, stories, and reports through her choices using Intellikeys, said the Co-op's inclusion facilitator and speech and language therapist.

In concluding that the student has not benefited from the School District's efforts to educate her in a regular education classroom, the School District does not thereby reject the idea that computer based assistive technology, immersing the Student in an environment of language and literacy, and interaction with non-disabled peers are critical components of an appropriate program for her. To the contrary, says the School District, All of these components would be included in an ELS program for the Student. The School District believes that through such a program it could integrate the components in a way that benefits the Student educationally, which the School District contends, is not the case in her current regular education placement.

The School District thus requests the Hearing Officer to rule that the ELS Program it has proposed for the Student is an appropriate placement in the least restrictive environment, and that her current regular education placement is inappropriate for her.

Position of the Parents

The Parents contend that the School District is required under the IDEA to educate the Student in an inclusive regular education program. Such a requirement, say the Parents, follows clearly from a review relating the facts in this case to any of the standards that courts currently use to apply the IDEA's least restrictive environment mandate in particular factual circumstances.

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The Parents note in this regard the agreement of the Parties upon the critical importance of the emergent literacy approach for developing the Student's abilities in the areas of communication and cognition. This approach, say the Parents, involves immersing a student in an environment of language and literacy as a means of fostering a student's communicational and cognitive development. The emergent literacy approach, the Parents observe, contrasts with a reading readiness model that assumes the skill of reading can be factored without remainder into a discrete set of identifiable component processes, and, accordingly, that educational measures to prepare students for learning to read should consist largely of drills to master these processes. In contrast to a reading readiness model, the Parents note that the emergent literacy approach is inherently holistic, and as such, in the opinion of the Parents, necessitates both inclusion and natural settings, such as a regular classroom, for educating children with severe to profound communicational and cognitive disabilities.

As a separate point, the Parents stress that, in their judgment, contact with other children has an exceptionally strong motivational force with respect to the Student's efforts to communicate. Maintaining social connections with peers who know the Student, and who the Student knows and trusts, say the parents, significantly increases the likelihood that the Student will interact with them. Furthermore, the Parents point out that most of the Student's IEP goals and objectives have a major social component realizable only through interaction with peers who can communicate with her. Opportunities for such communication, the Parents note, are far more extensive in a regular education classroom with

more peers who can interact with the Student, "more content, more things to talk about, more ideas, books, and activities" than in a self contained classroom (Parent's Post-Hearing Brief, p. 96).

The Parents strongly contend that a review of the Student's current functional levels with respect to communication and cognition indicates she can benefit from an inclusive regular education program. In this regard, the Parents point to the extensive testimony at the hearing of the Students two private providers of educational services, one of whom specializes in the education of children with severe to profound disabilities, and the other of whom is a speech and language therapist. The private providers, both of whom have worked with the Student for many years (eight years and ten years respectively) testified to unmistakably steady progress by the Student since they began to work with her. The Student's private educational specialist described the student as having "some very solid skills in terms of communicating" at this time (Tr. 1/19, p. 201). In this regard, the Student's private educational specialist said that the Student expresses 'yes' and 'no' in ways that are definite, consistent, and used "very reliably" (Tr. 1/19 pp. 199-200). The Student's private speech and language therapist described the Student's ways of communicating at this time as "not hard to read" (Tr. 2/9 p. 190).

Both of the Student's private providers testified that over the past two years the Student has shown a significantly firmer grasp of the "function of communication" (Tr. 1/19 p. 199). The Students private educational specialist said in this connection that the Student "now understands that her eye gaze is going to be read so she is much more careful

about using it" (Tr. 1/19 p. 200). In response to a question put to her by counsel for the Parents at the hearing about how she confirms or verifies the content of the messages expressed by the Student, the Student's private speech and language therapist said:

> Well generally [the Student] is pretty good. If I'm not sure, and I say to her . . . are you telling me — I think this is what you are telling me, if you are telling me this then you need to look at me, she will look at you if it is something she is telling you. And she is very persistent. She looks at you, she has her eyes opened (indicating), she is leaning forward. She is clearly saying yes, that's what I want. If it is something that she doesn't want, she doesn't respond or else looks away. And that's very very consistent (Tr. 2/9 pp. 191-92)

In a similar vein, the Student's private educational specialist related:

> If [the Student] is looking over at the lotion [which the Student's private educational specialist applies to the Student's hands to relax her], and I mean literally craning her neck and looking over at the lotion and looking at me and I have ascertained that she's having a pretty good day, her body tone is good, I can say, "Oh I can tell you want a drink of water."

> and she'll look at me like "What are you talking about?" She'll look at me with surprise. She'll raise her eyebrow. She'll look back to the lotion like "Woman, you are out of your mind. What are you doing?" (Tr. 2/2 p. 243)

The Student's private providers testified that over the years they have worked with the Student the amount of time she takes to respond to questions has decreased, and her ability to remain focused throughout an instructional session has steadily increased. The Student's private educational specialist said that the Student has demonstrated she can make choices from a field of eight on an adapted keyboard. The Student's private speech and language therapist related in her testimony at the hearing an anecdote which strongly suggested to her that the Student can experience as humorous jokes programmed on her talker (Tr. 2/9 pp. 198-99). In second grade, the Student's private providers noted, the Student began to write stories and poems with the use of special software, which enabled her to make choices on a keyboard overlay among picture icons associated with different items of written text. The Student's private educational specialist said that the Student now evidences increased understanding of how a story flows. In this regard, she said that the Student responds to questions calling for predictions about what will occur next in the plot of a story (Tr. 2/2 pp. 40-41).

The Parents contend that the observations of the Student in her classroom during the school day made by School District and Co-op staff provide an insufficient basis upon which to draw conclusions about whether the Student can

benefit from an inclusive regular education program. This is because the Student's current program, provided by the School District, has deficiencies, say the Parents, of which the gravest, in their opinion is that, in the words of the Parents' expert witnesses, it makes no "thoughtful or concerted effort . . . to include [the Student] in the learning activities and life of the classroom in which she is physically placed" (Parents' ex. 007). In regard to this point, the Parents' two expert witnesses reported that when they observed the student in her classroom the Student's one on one aide conducted all of the educational activity with respect to her. Based upon their observations the Parents' two expert witnesses concluded that the Student's program makes no provision for the Student to experience direct interaction with either her classroom teacher or her non-disabled peers.

The Parents' expert witnesses emphatically rejected the notion that such interaction is ruled out by the student's levels of ability in the areas of communication and cognition. To the contrary, the Parents' expert witnesses suggested both general strategies and specific measures which, in their judgment, the School District could adopt with little difficulty to facilitate the Student's inclusion in the learning activities and life of her classroom. The Parent's expert witnesses contended also that such strategies and measures would become easier, rather than more difficult, to implement next year, as the Student moves into the sixth grade, which will mean transferring to a junior high school.

The Parents' expert witnesses severely criticized the teaching approach used by the Student's one on one aide, referring to it as "a repetitious form of attention drill and

physical therapy" with "no apparent cognitive or communicative goal" (Parents' ex. 005). Based upon their observations of the Student's interactions with her one on one aide in the classroom setting, they concluded that the aide had not been trained appropriately in the use of the Student's assistive technology equipment to foster either communicational interchange or other kinds of learning experiences called for by the emergent literacy approach. The Parents' expert witnesses also concluded that the Student's one on one aide lacked full awareness of the ways in which the Student indicates 'yes' and 'no,' and, in some instances, they reported, when working with the Student, the aide located herself in a position that made it impossible for her to get a clear view of the Student's eye gaze (Parents' ex. 006).

The Parents regard the inadequacies (from their standpoint) in the teaching performance of the Student's one on one aide as part of a long standing failure by the School District to provide its staff adequate training and support for working with the Student. In this regard, the Parents contend further that the School District was grossly tardy in utilizing assistive technology to educate the Student, and in seeking the advice and support of an inclusion facilitator to develop the Student's program. The Parents call into question the qualifications of the expert consultant upon whom the School District relied for advice on developing an IEP for the Student. In this regard the Parents contend that the consultant to whom who the School District looked to for advice has only conducted two research studies involving children with Rett Syndrome, neither of which, say the Parents, has any pertinence with regard to developing an appropriate educational program for the Student.

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The Parents also characterize the School District's attitude as unrelentingly negative and uncooperative almost from the day the Parents indicated their desire for the Student to receive her education in a regular classroom. The Parents contend, in this connection, that School District memoranda, prepared as early as 1994, indicate the School District's anticipation of a conflict with the Parents over the Student's placement that would eventuate in a due process hearing. As a clear example of the School District's continuing negative and uncooperative attitude, the Parents cite the School District's refusal three years later, in 1997, to act upon the recommendation of an evaluator, jointly agreed upon by the School District and the Parents, that favored the Student's inclusion in the regular education environment.

An especially glaring example of the School District's negative and uncooperative attitude, say the Parents, has been its steadfast refusal to allow the Student's private providers to observe the Student in her classroom. The Parents relate that when the Student was in first grade, the School District indicated it would not allow her private educational specialist to enter her classroom for the purpose of correcting a glitch in one of the computer programs used for educating the Student. Since that time, aver the Parents, the School District has never allowed either of the student's private providers to come into her class for any purpose. The Parents view this refusal as particularly troublesome given the vast differences in the reports of the Student's private providers, as compared with those of the Co-op and School District staffs, with respect to the Student's levels of ability in the areas of communication and cognition.

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As yet another example of negativity on the part of the School District, the Parents contend that at IEP meetings, and in progress reports, the School District has characterized the Student's levels of communicational and cognitive ability in ways that emphasize her deficits, and downplay, or ignore, her strengths. The Parents further contend that the School District's negative emphasis carried over into its formulation of the Student's IEP goals and objectives. In this regard, the Parents call attention to, what they consider, the School District's excessive concentration upon the Student's responses to questions intended to test her, as contrasted with trying to increase the frequency, and enhance the quality of, the Student's communicational interactions. The Parents also point, in this connection, to goals the School District wrote for the Student which required that she communicate by activating a computer switch, even if she had already responded to a question by way of her eye gaze. Such an overly stringent approach, say the Parents, refuses to acknowledge the validity of the Student's principal means of communicating, and, as a result, discourages her from making any effort to communicate at all.

The Parents contend that the way in which the School District wrote the Student's goals and objectives in her June, 1997 IEP ruled out the possibility of quantifiable, objective comparison of her initial and subsequent performance levels. In the opinion of the Parents, however, despite this grave flaw, testimony by the Co-op's inclusion facilitator, as well as data gathered by the School District's inclusion/special needs coordinator, contradict the position of the School District that the Student has made no progress relative to her IEP goals and objectives. With respect to the testimony at

the hearing of the Co-op's inclusion facilitator, the Parents point to questions posed to her by counsel for the Parents about the meaning of the word 'emerging' that was written on several sheets of the Student's June, 1997 IEP in the section of the sheets for describing whether the Student had made progress with respect to a particular goal or objective. In this regard, say the Parents, the Co-op's inclusion facilitator testified that if, for example, the Student's IEP indicated that in 1997 the Student had not met a particular goal, but that for the following year the phrase 'not met' was replaced with the word 'emerging,' then this indicated that the Student had made progress relative to that goal. With respect to the data gathered by the School District's inclusion/special needs coordinator, the Parents contend that this data indicates progress, rather than lack of progress, by the student in connection with a number of goals and objectives specified in her June, 1997 IEP.

The Parents maintain strongly that the ELS program, proposed by the School District is inappropriate for the Student. The Parents contend, in this connection, that the ELS program would not provide the kinds of opportunities for interaction with non-disabled peers that the Student needs to develop her abilities in the areas of cognition and communication. Students in ELS classes, note the Parents, are predominantly non-verbal and have severe cognitive disorders. At least one of the School District's ELS classes, the Parents notes, is designed for instruction of autistic students. The Parents emphatically reject the possibility that the School District could provide the amount and quality of social interaction with non-disabled peers that the Student needs, as the School District proposes to do, through lunch,

gym, and field trips, and through a program that calls for non-disabled students to visit her classroom on a volunteer basis. Mainstreaming for lunch, gym, and field trips is far too little to benefit the Student, say the Parents. The kind of visiting by non-disabled students the School District contemplates, in the opinion of the Parents, has a staged quality about it, at odds with the Student's need for natural environments in which to develop her communicational and cognitive abilities.

The Parents argue that the School District has committed numerous procedural violations of the IDEA. Some of these violations, say the Parents, concern failure on the part of the School District to adhere to statutory and regulatory timelines. Other procedural violations, the Parents contend, relate to allowing the School District's expert consultant to observe the Student without the Parents' consent, denying the Parents meaningful opportunity to participate in the IEP process, and refusing to consider the recommendations of experts familiar with the Student.

The Parents accordingly request the Hearing Officer to make the findings and grant the relief indicated below:

Findings Requested by the Parents:

1) The School District failed to provide adequate or sufficient training or support for the Student and the Staff working with her.

2) The School District has failed to monitor the Student's progress in a consistent, quantitative manner to allow for accurate judgments as to her progress.

3) The School District has not adequately facilitated the Student's participation in the curriculum or her interaction with her peers.

4) The School District has not utilized emergent literacy strategies to facilitate the Student's learning and development as a reader and communicator, although they endorse this educational strategy.

5) The School District was grossly tardy in conducting an Assistive Technology evaluation. The evaluation itself was inadequate. The School District was tardy in procuring appropriate technology for the Student and has implemented the use of the technology ineffectively.

6) Despite these conditions, the Student has made progress on her goals and objectives and in a variety of skills not reflected or measured by the goals and objectives.

7) Given that the Student has Rett Syndrome and other disabilities, her progress will be in small increments relative to her developmentally typical peers, but she is capable of additional progress in virtually all areas.

8) There are generally adequate services available already to support the Student at the Junior High School in the District she would attend during the next school year in a regular education placement without having to import or duplicate all the services available in the ELS programs.

9) The School District failed completely to collaborate with the Student's private therapists, to the detriment of her education.

10) The Student has ongoing peer relationships in the area served by the School District which have both intrinsic value and are critical to facilitating her communication.

11) The regular education Junior High School the Student would attend if not placed in the ELS Program can provide an appropriate education, given adequate special education and related services and appropriate accommodations and modifications.

12) The regular education Junior High School the Student would attend if not placed in the ELS Program is the least restrictive environment for the Student.

13) The ELS program is overly restrictive, lacks appropriate communication models, has a peer group and teaching methods that are contraindicated for the Student, and would require a physically taxing and unnecessary bus ride of 30-45 minutes each way.

14) The Emergent Literacy model is appropriate for the Student and should be implemented in her regular education based program.

15) The School District improperly ignored the recommendation of the independent evaluator agreed to by the parties that the Student should remain in her current regular education placement.

16) The School District determined before the Student entered kindergarten that it would ultimately recommend her transfer to a self-contained, out of district program, reflecting a pre-determination of the Student's place-

ment, without the Parents' input, and without serious consideration of additional supports and aides to facilitate her success in regular education.

17) The School District failed to provide any meaningful support for the Student's program during kindergarten and first grade.

On the basis of the above findings the Parents believe the Hearing Officer should conclude as a matter of law that the School District has failed to satisfy its statutory obligation with respect to either FAPE or LRE and has violated the Supreme Court standard in *Board of Education of the Hendrik Hudson School District v. Rowley* 458 U.S. 176 (1982) and both the least restrictive environment standards of *Roncker v. Walter* 700 F.2d 1058 (6th Cir. 1983) and *Daniel R.R. v. State Board of Education* 874 F.2d 876 (4th Cir., 1989) and their respective progeny. Further, say the Parents, the Hearing Officer should conclude that the School District violated various procedural obligations in relation to the Student and her family in a manner that ultimately deprived the Student of a free appropriate public education.

Relief Requested by the Parents:

1) Order that the Student be placed in a regular education based program at the Junior High School she would attend for sixth grade if not placed in the ELS Program, (hereinafter, the Junior High School) with necessary special education and related services to be provided to supplement and support the Student's regular education programming.

2) Order that an IEP meeting be convened to effectuate this order, with the Parents' consultants, and the independent evaluator jointly selected by the parties involved, at School District expense, for the purpose of developing an appropriate IEP for the Student at the Junior High School.

3) Order that the Student's involvement in regular education classes at the Junior High School will exceed 50% of the school day and that course selection, prerequisites, and sequence requirements will be relaxed to promote creative programming of her school days. Special education resource time, pull out related services, nap time, toileting time, passing periods and lunch will not be counted towards the regular education class time.

4) Order that a mutually agreed upon inclusion facilitator and case manager be appointed for the Student, given the tensions surrounding this dispute, and that the IEP specify a minimum of 10 hours per week of facilitator services for the Student and that a one on one aide will be provided for the Student.

5) Order that intensive in-service training be provided at School District expense to the staff assigned to work with the Student, to address Rett Syndrome, inclusive practices for children with severe cognitive and communication disorders, and emergent literacy, prior to the start of the school year, to be provided by trainers acceptable to the Parents, and to include orientations concerning the Student to be provided by the Student's mother.

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6) Require in-service training on Rett Syndrome, emergent literacy, and inclusion at School District expense, by trainers acceptable to the Parents, for all staff, no later than the end of the first quarter of the school year.

7) Require the immediate development of a transition plan to the Junior High School to include opportunities for the Student to visit on several occasions and meet her teachers prior to the start of school.

8) Require that the Student's IEP include a plan for social support and facilitation of peer interaction, including ongoing disability awareness training for her peers and support for all peers interested in supporting the Student.

9) Require development of a plan for delivery of related services that minimizes disruption of the Student's participation in regular classes and maximizes integration of related services activities within the regular class activities.

10) Require provision of a plan and space for the Student to have breaks and/or naps as needed.

11) Order an updated assistive technology evaluation and ongoing assistive technology consultation as a component of the Student's IEP.

12) Require that the monthly team meetings including the Student's mother confirm and provide for at least quarterly participation at School District expense of the Student's private providers of educational services.

13) Require that the Parent's therapists and/or the Student's Parents be permitted to observe the Student at school, with reasonable notice for periods, at their discretion, of up to four hours per observation. Such observations would not occur more than bi-weekly during the first two months and quarterly thereafter.

14) Permit the Student's mother to observe the Student intermittently with reasonable notice, but at least quarterly, or more often to the extent other Parents are permitted to observe more often.

15) Given the intensity of the conflict surrounding this case and the need for a three year reevaluation, require that the reevaluation components be conducted at School District expense by mutually acceptable outside evaluators.

16) Order that the Parents be reimbursed for the costs of the private evaluations by the Parents' expert witnesses, and that the Parents' expert witness who specializes in the education of children with severe to profound cognitive disabilities be utilized at School District expense as a consultant in person to assist in the development of the Student's IEP and in reviewing it at the end of the year.

17) In light of the inadequacy of the School District's program (in the opinion of the Parents) and the success of the private therapists (in the opinion of the Parents), as well as the important role the therapists play in assisting the Parents, order that the Parents be

reimbursed for the costs incurred for services by the independent clinicians from the date the hearing was requested to the present.

18) In light of the tension involved in this case and the School District's expert consultant's involvement, order that the School District's expert consultant can no longer be involved in the Student's educational program.

19) Grant such other relief as the Hearing Officer deems just.

Opinion

Upon a full review of the evidence and testimony presented in this case, including the arguments of the parties in their post-hearing briefs, the Hearing Officer concludes that the School District has offered the Student an appropriate educational placement in the least restrictive environment as required under the Individuals With Disabilities Education Act (20 USC 1412 (a)(1), 20 USC 1412 (a)(5)). In the discussion that follows immediately below the Hearing Officer will develop the reasons upon which he has based the above conclusion.

Is the ELS Program appropriate for the Student?

The Hearing Officer begins his analysis with respect to the above question with some familiar points relating to the case of *Board of Education of the Hendrik Hudson School District v. Rowley* 458 U.S. 176 (1982), which are foundational for the law of special education. In *Rowley* the United States Supreme Court set out the following two part

test for a court to determine in a given case whether a school district has met the requirement of the IDEA to provide a special needs student a "free appropriate public education."

> . . . A court's inquiry in suits brought under . . . [the IDEA] is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefit? If these requirements are met, the State has complied with the obligations imposed by Congress and Congress and courts can require no more (pp. 206-07).

With regard to the question of what the phrase "educational benefit" means in the preceding statement, the Supreme Court made it clear in *Rowley* that a School District need only satisfy a distinctly limited standard in regard to the services it provides a student. In this regard the Court said:

> By passing the [IDEA], Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education, Congress did not impose any greater substantive standard than would be necessary to make such access meaningful. Indeed, Congress expressly recognized that in many instances the process of providing special education and related services is not guaranteed to produce any particular outcome. Thus the intent

> of the [IDEA] was more to open the door of public education to handicapped children on appropriate terms than to guarantee any level of education once inside (p. 192).

With respect to the last point in the preceding quotation, the Court considered, but expressly rejected a more stringent view of a school district's legal obligation, under which an "appropriate" free public education means an education making it possible for a student with an educational disability to achieve the level of progress she could attain but for her disability (*Rowley* at pp. 198-200). The Supreme Court made it clear in *Rowley*, however, that a school district need not meet this higher standard to fulfill its obligations under the IDEA. It need only provide an education from which the student derives "some benefit," (*Rowley* at p. 200) that is "meaningful" in the limited sense of "opening the door of public education" to children with educational disabilities.

In many instances the crucial issue before a Hearing Officer, upon which a case turns, is simplified by the modest substantive standard that a school district must meet under *Rowley* to satisfy its basic obligation, set out in the IDEA, to provide special needs students a "free appropriate public education." In the opinion of the Hearing Officer, however, this is not such a case. Most of the extensive testimony and evidence presented by both parties at the hearing in this matter, it seems to the Hearing Officer, relates precisely to the question of which placement — the ELS Program proposed by the School District or the inclusive regular education approach the Parents favor — will, or will not, provide the Student educational benefit in the limited *Rowley* sense.

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The Hearing Officer considers the question exceptionally difficult, if not (perhaps) impossible, to resolve on the basis of the evidence and testimony provided by the parties at the hearing, despite the thoroughgoing detail of their respective presentations. In this regard, expert witnesses for both the School District and the Parents agreed that no comparative studies exist on the topic of effective educational approaches to employ in the classroom for developing the communicational and cognitive abilities of children who have Rett Syndrome (Tr. 3/20 pp. 111-12, 195). Furthermore, none of the expert witnesses, or professional educators involved in providing services for the Student, called to testify by either party in this case has worked with more than a few girls with Rett Syndrome over the course of her or his career (Tr. 10/25 pp. 176-77, 10/29 pp. 220-22, 11/1 p. 103, 11/10 p. 9, 11/22 p. 10, 1/19 p. 63, 2/9 p. 16). Both the School District's (and the Co-op's) staff and the Student's private providers have extensive direct experience working with the Student. Their respective reports of their experiences, however, conflict significantly on fundamental issues concerning both the ease with which one can determine whether the Student has engaged in communicational activity, and, if so, what message the Student has communicated. For reasons the Hearing Officer will discuss later in this opinion, he finds this conflict between the reports of the School District and the Parents likewise difficult, if not impossible, to resolve on the basis of the testimony and evidence presented at the hearing. The Hearing Officer observes, in this connection, that the Student's private educational specialist described the conflict as an issue about which the parties in this matter may have to "agree to disagree" (Tr. 3/20 p. 202).

The Hearing Officer thus would be hard pressed if he had to make a decision about the kinds of programs likely to provide benefit (even in the limited *Rowley* sense) for the Student in this case. The Hearing Officer does not believe, however, that he must address this issue in order to assess the appropriateness of the School District's proposed placement. In this regard, the Hearing Officer notes that the second critical question under the *Rowley* test does not call specifically upon a Hearing Officer to decide whether, in her or his opinion, a school district's proposed program, in all likelihood, will provide a student educational benefit.The question instead requires that a hearing officer consider whether or not the School District has proposed a program *reasonably calculated* (in the words of the Court) to confer benefit upon that Student.

In their post-hearing brief, the Parents noted that in an unrelated case this Hearing Officer expressed the opinion that "a school district has the burden of proving by a preponderance of the evidence that it has proposed an appropriate placement for the Student" (*Palatine Community Consolidated School Dist. No. 15*, 29 IDELR 258, page 10, aff'd *T.H. v. Board of Educ. Of Palatine Community Consol. School Dist. No. 15*, 55 F. Supp 2d 830 (N.D. Ill. 1999). The Hearing Officer believes that, relative to the immediately preceding quotation, one needs to distinguish precisely between the following two questions:

(a) Does the evidence and testimony presented at a due process hearing establish by a preponderance of the evidence that a placement a school district has provided for a student is reasonably calculated to provide the Student educational benefit?

(b) Does the evidence and testimony presented at a due process hearing establish by a preponderance of the evidence that a placement a school district has provided for a student is likely to provide a student educational benefit?

The Hearing Officer notes that, in most cases, when a judge or hearing officer arrives at a conclusion with respect to question (a), he or she thereby forms an opinion concerning question (b). It seems to the Hearing Officer, however, that one cannot exactly equate questions (a) and (b) under circumstances where a broad zone of uncertainty surrounds issues concerning the kinds of educational measures likely to provide a student educational benefit in the limited *Rowley* sense. In such circumstances, the Hearing Officer believes, question (a), which corresponds to the specific wording of the second prong of the *Rowley* test, requires critical reflection upon what it means, consistent with the text of the IDEA, to characterize a placement as *reasonably calculated* to confer educational benefit.

The Hearing Officer cannot supply a general answer to this question. He believes, however, that in this case, given the broad zone of uncertainty with respect to the kinds of measures likely to benefit the Student, a proposed program is reasonably calculated to confer educational benefit to the extent it reflects careful and competent analysis that includes reasonable efforts to obtain relevant information needed to develop a beneficial placement for the Student. In the opinion of the Hearing Officer the above standard fits closely with the reasoning of the Court in *Rowley*. The Hearing Officer places special emphasis, in this regard, upon the *Rowley*

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Court's statement that "the provision [in the IDEA] that a reviewing court base its decisions on 'the preponderance of the evidence' is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities they review" (p. 206). It seems reasonable, in the opinion of the Hearing Officer, to assume that the Court intended the above point to apply not only with respect to a judge's or hearing officer's notions of sound educational policy, but also to her or his judgments about specific details of the appropriate educational approaches to adopt with particular students. For reasons developed immediately below, the Hearing Officer views the School District's proposed educational program in this case as reasonably calculated, in the sense articulated above, to benefit the Student. That is to say, the Hearing Officer believes that the School District's proposal reflects a careful and competent analysis that included reasonable efforts to obtain information for providing the Student a beneficial placement.

Unrebutted testimony and evidence presented by the School District at the hearing indicates to the Hearing Officer that in making its placement proposal the School District took into account information and opinions about the Student drawn from a wide range of highly pertinent sources. The School District sought the advice of an outside consultant knowledgeable on the subject of Rett Syndrome. Furthermore, the Hearing Officer, notes, at the times of both the June, 1997 and April, 1999 IEP meetings, at which the School District proposed the ELS placement for the Student, diverse members of the School District's and the Co-op's staffs, all with solid professional credentials, had worked

extensively with the Student. Some Co-op staff members, such as the inclusion facilitator and the speech and language therapist, had worked with the Student for several years. In addition, the Hearing Officer points to the large amount of information, and the frequently expressed opinions, concerning the Student's educational needs that the School District received from the Parents, as well as from the therapists and consultants retained by the Parents.

Based upon the information and opinions the School District gathered from the above sources, it concluded that the ELS program addressed the Student's educational needs. The School District believed that, in light of her multiple severe to profound disabilities, the Student would benefit from the presence of a trained special education teacher in the classroom, and from the efforts of professional educators in different disciplines working in especially close coordination to help the student achieve her IEP goals. The Hearing Officer thus believes that the School District's placement proposal for the Student reflected a careful and competent analysis that included reasonable efforts to obtain relevant information to develop a beneficial program for the Student. Accordingly, the Hearing Officer concludes, the proposed placement of the School District is reasonably calculated to provide the Student educational benefit.

The Hearing Officer recognizes that important parts of the testimony and evidence the Parents presented at the hearing in this matter indicate their strong disagreement with the above conclusion. After reviewing, and reflecting upon, such testimony and evidence presented by the Parents, however, the Hearing Officer's conclusion remains unaltered. In this

regard, counsel for the Parents brought out on cross-examination of the School District's expert consultant that his principal areas of research deal with other topics than either Rett Syndrome or communication problems of children with multiple severe to profound disabilities. The Hearing Officer acknowledges this point but believes, nonetheless, that evidence contained in the record of this case confirms that the School District's consulting expert is knowledgeable on the subject of Rett Syndrome. (In this connection, however, the Hearing Officer notes again the extent to which issues of major importance concerning education in the classroom of children with Rett Syndrome have not been studied in depth, if at all, by anyone).

Furthermore, the Hearing Officer does not believe that the record in this case supports a judgment that the proposal to place the Student in the ELS Program originated with a recommendation by the School District's expert consultant, which the School District's educational staff then adopted largely out of deference to him, based upon their perception of his superior expertise. In contrast, the Hearing Officer considers the record in this case to indicate that the School District's consulting expert participated in the decision to recommend the ELS placement, and that he supported the decision, but not that his participation and support was the predominant single factor behind the decision. In this regard, the Hearing Officer points to the extensive testimony at the Hearing of School District and Co-op staff, who worked directly with the Student, in regard to considerations drawn from their experience that loomed large in the School District's placement decision.

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The principal reason why the Parents consider the ELS program inappropriate for the Student concerns its woeful inadequacy, from the Parent's viewpoint, with respect to providing a social environment essential to develop her communicational and cognitive skills. In this regard, the Parents note that all the Students in any ELS class, where the Student might be placed, would have severe to profound cognitive disabilities. The also noted that, in the case of one ELS classroom, such disabilities related to diverse autistic conditions which limit the awareness of ELS Students in regard both to the intent of efforts by others to communicate with them, and the contents of those efforts.

Given the profile of the Student in this matter, agreed to by both the Parents and the School District, the Hearing Officer recognizes the educational importance, relative to the development of the Student's communication skills, of establishing a social environment with significant opportunity to interact with non-disabled peers. As noted above, the Parents contended at the Hearing that the ELS program would not provide such a social environment. To the contrary, however, the School District maintained it would do so.

With respect to the School District's contention, staff members of the Co-op testified the ELS program calls for the Student to interact with non-disabled peers at lunch and in an adaptive physical education class. The Co-op staff members also testified that students in the ELS Program interact with regular education students on field trips, and, when appropriate, they are mainstreamed into regular education classes. In addition, the ELS Program, noted the

Co-op staff members, arranges for non-disabled peers regularly to visit ELS classrooms on a volunteer basis. These students, said the Co-op's staff members, not only have strong motivation to interact with the ELS students, but also receive prepping to facilitate such interaction.

In response, the Parents expressed the view that the kinds of interaction with non-disabled peers provided for in the ELS classroom, although well intentioned, has a "staged" aspect that severely limits its educational value. The Parents maintained, in contrast, that only constant immersion in natural social environments, with non-disabled peers, will sustain the Student's motivation to communicate. All of the witnesses testifying on behalf of the Parents who had observed ELS classrooms expressed the opinion that communicational interchange among students in the classes they observed was minimal.

Based upon the testimony and evidence presented in connection with the hearing in this matter, the Hearing Officer believes that the Parents have raised a number of significant questions concerning the issue of whether the ELS program will provide a social environment in which the Student can develop her communication skills. Furthermore, the Hearing Officer cannot say he believes the School District's responses to the Parents' questions have conclusively put the issue to rest.

The Hearing Officer regards it as important in this connection, however, to note that he cannot hold the School District to a standard of justification which, in the nature of the case, cannot be met. In this regard, the Hearing Officer points out the complete absence of research studies on the

educational effectiveness of different approaches in the classroom to developing the communicational and cognitive skills of children with Rett Syndrome that was noted by the School District and acknowledged by the Parents. Given that so little is now well confirmed on this topic, it seems to the Hearing Officer that any placement proposed for the Student, including the regular education program favored by the Parents, raises unsettled questions. Such unsettled questions, it seems to the Hearing Officer, are comparable in their significance to those with respect to the issue of the extent to which the social environment in the ELS Program will foster educational progress for the Student in the areas of communication and cognition.

In the opinion of the Hearing Officer, as noted above, the relevant standard of justification in regard to the School District's conclusions as to the appropriateness of the social environment in the ELS Program for the Student to develop her communicational and cognitive skills concerns whether those conclusions reflect a careful and competent analysis that includes reasonable efforts to gather relevant information. In light of his review of the testimony and evidence presented in this case, the Hearing Officer believes that the School District has met the above standard. He thus considers the School District to have fulfilled its responsibility under the IDEA to propose an appropriate educational placement for the Student. The Hearing Officer discusses immediately below the question of whether the placement proposed for the Student by the School District would be the least restrictive environment for her, as also required by the IDEA.

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Is the ELS Program the Least Restrictive Environment for the Student?

As both parties noted in their post-hearing briefs, the U.S. Court of Appeals for the 7th Circuit has not adopted an explicit standard for determining whether a school district has satisfied the least restrictive environment requirement of the IDEA (20 USC 1412 (a)(5)). Both parties identified and discussed in their briefs a number of standards in this regard adopted by other federal circuit courts (*Roncker v. Walter* 700 F.2d 1058 (6th Cir. 1983), *Daniel R.R. v. State Board of Education* 874 F. 2d 876 (4th Cir., 1989, *Sacramento City School District v. Rachel Holland* 14 F. 3d 1398 (9th Cir. 1994), *Hartmann v. Loudoun County Board of Education* 118 F. 3d 996 (4th Cir. 1997)). The Hearing Officer notes that all of the tests discussed both by the School District and the Parents concur in concluding, what seems evident to the Hearing Officer given the explicit wording of 20 USC 1412 (a)(5), that an inappropriate placement cannot qualify, in virtue of its inappropriateness, as the least restrictive environment for a student.

Consistent with the above point, the School District's argument in support of its position relative to the least restrictive environment issue in this case primarily involves detailed evidence and testimony presented to show that the Student has not benefited in the critical areas of communication and cognition from her regular education placement, despite extensive efforts by the School District to make that placement succeed. The School District acknowledges that the Student's regular education placement has provided her opportunities for social learning through interactions with

her non-disabled peers. The frequency and communicational content of such interactions, however, says the School District, does not rise anywhere near to a level that would justify the Student's regular education placement, given that placement's lack of success (from the School District's viewpoint) for the Student in the areas of communication and cognition.

The Parents counter that the School District's current program for the Student has grave shortcomings in terms of both its implementation and the ways in which the School District has gone about preparing and planning it. The relevant basis of comparison with respect to a least restrictive environment determination for the Student, say the Parents, is not the Student's lack of progress in her current placement, with its numerous deficiencies (from the Parents' viewpoint), but instead, the progress she could make in an improved inclusive program without these difficulties. The Parents also contend, however, that despite the shortcomings, in their opinion, of the Student's current program, contrary to the School District's position, the Student has made genuine progress in that program with respect to her IEP goals and objectives. The School District, says the Parents, has exaggerated the Student's lack of progress in her current placement by concentrating excessively upon what she has not accomplished, and downplaying, or even ignoring, her successes.

The Parents' two expert witnesses stated in their report that on the day they visited the Student's classroom the Student spent virtually all of her time engaged in one on one instruction with her aide. The classroom teacher neither interacted herself with the Student, the Parents' experts

report, nor made any efforts to get the other students in the class to do so. In the opinion of the Parents' experts, several educational activities that took place in class on the day of their visit provided excellent opportunities for including the Student, which the Student's teacher missed.

The School District acknowledges that the Student's interaction with other students in her current placement is limited, especially in connection with educational activities related to academic subjects. Such limited interaction, however, the School District contends, does not stem from failures on its part with respect to effort, competence, preparation, or planning. In this regard, the School District notes the diverse extensive efforts it has made over a period of nearly six years, since kindergarten, to provide a beneficial regular education placement for the Student. The problem, in the opinion of the School District, relates to the Student's severely limited abilities in the areas of communication and cognition. These limited abilities, says the School District, make it extremely difficult for School District staff, as well as for the Student's non-disabled peers, to determine whether the Student has engaged in communicational activity, and, if so, the message she has conveyed. In direct conflict with the position of the Parents, the School District views the limited interaction between the Student and her regular education peers as a key indication, among others, of her lack of educational progress in her current placement despite the School District's efforts to make that placement succeed. The Student's lack of progress in a regular education placement, says the School District, indicates the need to try another approach, such as the ELS Program.

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The Parents strongly believe, in turn, that the School District's acknowledged lack of success with the Student in the areas of communication and cognition resulted, in all likelihood, to a large extent from the School District's steadfast refusal, (from the Parent's perspective), to work in constructive collaboration with the Student's private providers of educational services. The Student's private providers, note the Parents, consistently reported much more success in communicating with the Student than did the School District and Co-op staff members who worked with her. The Parents maintain that the School District and Co-op should have explored actively whether their staffs could adapt successfully in the school environment various educational approaches of the private providers. The Parents view the School District's and the Co-op's failure to undertake such exploration on a continuing basis as one of the most grave deficiencies in the planning and preparation for the Student's regular education placement.

The disagreement between the Parents and the School District concerning which of the placements at issue in this case is the least restrictive environment for the Student thus relates to their sharply divergent views in regard to the appropriateness of a regular education placement for the Student. In assessing their respective views on this matter, the Hearing Officer begins by noting again the broad zone of uncertainty in this case concerning effective educational measures for the Student. In the immediately preceding section of this opinion the Hearing Officer indicated that, under such conditions of uncertainty, he views an educational placement as appropriate (i.e. as reasonably calculated to

confer benefit) to the extent it reflects careful and competent analysis that includes reasonable efforts to obtain relevant information to develop a beneficial program for a student.

The Hearing Officer believes that the above viewpoint likewise provides the correct standard of justification from which to assess the School District's contention in this case that a regular education program would be inappropriate for the Student, and thus cannot qualify as the least restrictive environment in which to provide her an educational program. In this regard, the Hearing Officer notes that 20 USC 1412 (a)(5), which requires school districts to educate disabled children in the least restrictive environment states that "to the maximum extent *appropriate* (underline added) children with educational disabilities shall be educated with non-disabled children. The Hearing Officer thus observes that 20 USC 1412(a)(5) calls for an interpretation of the word 'appropriate' no less than does 20 USC 1412(a)(1), which states the fundamental right of children eligible for services under the IDEA to a free appropriate public education. For reasons developed immediately below, the Hearing Officer believes that the School District based its conclusion that a regular education placement would be inappropriate for the Student in this case upon a careful and competent analysis that included reasonable efforts to obtain relevant information.

Insofar as the Hearing Officer understands the Parents' position, it includes the following related contentions. The Student's private providers of educational services, the Parents note, have extensive practical knowledge about effective educational approaches for the Student in virtue of

having worked with her for many years. Furthermore, note the Parents, both private providers independently rate the Student's abilities in the areas of communication and cognition much higher, based upon their experience with her in private therapy, than the School District and Co-op staffs rate the Students communicational and cognitive abilities on the basis of their work with her in school. The Parents thus maintain that the School District made a grave misjudgment by refusing to allow the Student's private providers to observe the Student in the school environment, and to work with School District and Co-op staff in shaping her program. For this reason alone, the Parents would contend, it seems to the Hearing Officer, that he (the Hearing Officer) should not view the regular education program the School District has provided for the Student to reflect careful and competent analysis that included reasonable efforts to obtain relevant information to develop a beneficial placement for the Student.

The Hearing Officer calls attention to conflict in testimony between the Parents and the School District concerning whether the School District explicitly refused to allow the Student's private providers to observe her in her classroom. Regardless of this conflict, however, the Hearing Officer notes that the record in this case indicates clearly that, at least beginning in first grade, the Student's private providers did not observe the Student in her classroom, and were never invited to do so by the School District. As indicated above, the Hearing Officer regards the critical question for him to examine at this point as whether the School District's conclusion that the Student could not benefit from a regular education classroom placement reflected a careful and competent analysis that included reasonable

efforts to obtain relevant information. Accordingly, the Hearing Officer believes he must now consider whether, in his judgment, the analysis the School District conducted meets this standard despite the fact that the School District did not invite the Student's private providers to observe the student in her regular education classroom.

In this regard, the Hearing Officer acknowledges that at the hearing in this matter both of the Student's private providers of educational services testified in detail about the work they have done developing diverse techniques to help the Student maintain her focus of attention during the sessions in which she works on improving her communicational and cognitive abilities. In the course of this testimony the private providers both described the problem of focusing and maintaining the Student's attention as significant, but reported definite steady progress over their years of working with the Student. The Hearing Officer recognizes that several members of the School District and Co-op staffs, directly involved in the Student's educational program, testified concerning the difficulties they encountered with respect to focusing and maintaining the Student's attention. It thus appears to the Hearing Officer that School District and Co-op staff may have benefited from more interaction with the Student's private providers in this regard than evidently took place.

The Hearing Officer considers it necessary, however, to consider this impression, on his part, in light of the School District's evidence and testimony concerning the nature and extent of its overall effort in trying to make a success of the Student's regular education placement. From such a

perspective, the Hearing Officer cannot conclude that the aforementioned respect in which one might reasonably criticize the School District's efforts, by itself, justifies characterizing those efforts, considered in their entirety, as either careless, incompetent, or as failing to include a reasonable attempt to obtain relevant information for developing a program that would benefit the Student.

As noted above, the reports of the Student's private providers diverge sharply from those of the School District and Co-op staffs relating to the ease with which the private providers can determine whether the Student has communicated, and, if so, the message she has conveyed. The Hearing Officer notes the following two fundamentally different possible outlooks concerning these divergent reports. The first outlook would view the divergence in the reports as the consequence of real differences in the way the Student carries on communicational and cognitive activity in the private therapy setting as compared with the school environment. The second outlook however, would say that the divergent reports do not stem from actual differences in the Student's behavior related to communication and cognition in two different settings. Instead, it would treat the conflicting judgments about the Student's communicational and cognitive abilities as reflecting disagreement in the views of the Student's private providers, as compared with those of the School District and Co-op staffs, over the appropriated criteria to apply for deciding in particular cases whether behavior of the Student counts as communication, and, if so, what message it counts as communicating. In regard to this second possible outlook, the Hearing Officer notes that at the hearing both of the Student's private providers testified

that they regarded the criteria employed by the School District and Co-op staffs for these purposes as unduly stringent (Tr. 1/19 pp. 249-50, 2/9 pp. 95-96)

In terms of the first of the above two possible outlooks, the Hearing Officer notes, by not inviting the student's private providers to observe the Student in the school environment, the School District's and the Co-op's staffs of professional educators possibly lost a valuable opportunity to obtain relevant information directly applicable to developing a beneficial program for the Student. It appears to the Hearing Officer, however, that if one assumes the second possible outlook then the consequences of not inviting the Student's private providers to observe the Student in her classroom were far less adverse. At most, it seems to the Hearing Officer, under the second outlook, the School District's and the Co-op's staffs of professional educators possibly missed a chance for enhanced discussion and increased mutual understanding with the Student's private providers in regard to their differing views about the appropriate criteria to use for interpreting the Student's behavior relative to communication. It is impossible to say, however, notes the Hearing Officer, whether this would have resulted in the School District's and the Co-op's staffs becoming persuaded they should adopt the criteria urged by the Student's private providers.

The Hearing Officer notes that the preceding characterization of two different possible outlooks concerning the divergence in the reports of the parties with respect to the Student's communicational and cognitive levels is actually oversimplified. In this regard, the Hearing Officer

points out, the divergence in the parties' reports could reflect the combined effects of the factors stressed in each of the two outlooks, and there are also numerous possible degrees to which these factors could combine. In the opinion of the Hearing Officer, neither of the parties in this case presented evidence and testimony sufficient for the Hearing Officer to address the preceding complex issues with respect to the sharp divergence in the reports of the School District and the Parents with respect to the Student's levels of ability in the areas of communication and cognition.

In this regard, the School District's expert consultant proposed as an hypothesis that Parents and caregivers of a child with Rett Syndrome may interact with her in ways resembling common patterns of interaction between parents and their infant children. Given the emotional bonding characteristic of such interaction, opined the School District's expert consultant, parents and caregivers of a child with Rett Syndrome may over-interpret the child's eye gaze, facial expressions, non-verbal vocalizations, and the like, mistakenly regarding them as efforts on the child's part to convey messages which lack of ability to speak prevents her from expressing in a clear way. The Hearing Officer notes, however that, no matter how suggestive the above hypothesis may be in general with respect to the parents of a child with Rett Syndrome, this alone would not justify his concluding that it must apply specifically to the Parents in this case. Furthermore, the Hearing Officer points out that the hypothesis does not apply straightforwardly to the Student's private providers, who are both credentialed and trained professional educators, with extensive experience in working with children who have severe to profound cognitive disabilities.

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On the other side of the issue, however, the Hearing Officer also has questions, which concern the basis of the Student's private providers strong confidence, they expressed in their testimony at the hearing, about the ease with which they can determine whether the Student has communicated, and, if so, the message she has conveyed. Both of the Student's private providers testified in this regard that when they each have doubts during a therapy session about the communicational significance or content of the Student's eye gaze they encourage her to engage in more communicational activity to help them better understand it. Based upon the testimony in this regard of the Student's private providers, however, it seems to the Hearing Officer, that their inferences with respect to the Student's follow-up behavior often could stand as much in need of reconfirmation, from the perspective of the School District, as the eye gaze of the Student which the private providers initially sought to reconfirm. In this regard, the Hearing Officer notes that the Co-op's inclusion facilitator and speech and language therapist both continued to regard the Student's eye gaze as difficult to interpret even after observing a session that the Student's private speech and language therapist conducted in her office with the Student.

The Hearing Officer thus does not believe the evidence and testimony that the parties presented to him in this case provide sufficient grounds for him to draw conclusions about the reasons behind the sharp divergence in the reports of the School District and the Parents concerning the Student's abilities relative to communication and cognition. In making the above point, the Hearing Officer's purpose is not to criticize, and certainly not to find fault with, the ways that the parties in this case have developed their respective

arguments. The Hearing Officer makes this point instead to underscore, what he has come to view as, inherent difficulties in developing an appropriate educational program for the Student in this case, given the limited base of knowledge concerning effective educational methods to utilize in developing her communicational and cognitive abilities.

In light of this limited knowledge base, the Hearing Officer cannot say whether, in his opinion, the School District would have been able to develop a regular education placement for the Student in which she would have made meaningful progress with respect to communication and cognition if the School District had invited the Student's private providers to observe the Student in her classroom. The Hearing Officer does not believe, however, that he needs to reach a conclusion about the answer to the above question, which, he notes, would require considerable speculation on his part. Instead, the Hearing Officer considers the following question as a critical one for him to address with respect to this matter. Must the Hearing Officer view the analysis underlying the School District's conclusion that the student has not benefited from her regular education placement as either careless, incompetent, or indicative of failure to make reasonable efforts at obtaining relevant information because the School District did not invite the Student's private providers to observe her in her classroom?

For the purpose of considering the above question, the Hearing Officer takes into account the overall efforts, detailed by the School District, in planning and implementing the Student's current placement. In this regard, he notes the frequent meetings between School District and Co-op staff

and the Student's mother, at which she had the opportunity to share information with the School District relative to the Student's sessions with her private providers. In addition, the Hearing Officer notes the reports that the School District received from the Student's private providers, as well as the attendance of the private providers at the Student's IEP meetings. Furthermore, the Hearing Officer calls attention to the fact that during the Student's second grade year, the Co-op's inclusion facilitator and speech and language therapist observed a session that the Student's private speech and language therapist conducted in her office with the Student.

Taking the above considerations into account, the Hearing Officer has reached the following conclusions. The Hearing Officer believes that inviting the Student's private providers to observe the Student in her classroom might have been helpful to the School District in designing and planning an inclusive regular education program for the Student. The Hearing Officer, however, cannot say he views the School District's conclusion that the Student has not benefited educationally in her current placement as careless, incompetent, or indicative of failure to make reasonable efforts to obtain relevant information because the School District did not invite the Student's private providers to observe her in her classroom.

In regard to the Parents contention of severe deficiencies in the way that the School District wrote the Student's IEP goals and objectives, the Hearing Officer cannot agree with the Parents that the goals and objectives, as written, preclude meaningful comparisons of the Student's initial and end of the school year performance levels. The Hearing Officer

acknowledges that in the areas of communication and cognition initial performance levels are characterized in words and phrases rather than in numerical terms. The Hearing Officer notes, however, the extreme difficulty obtaining quantifiable data in this regard agreed upon by both parties (S.D. ex. 470). As for the argument of the Parents that the School District's own evidence and testimony, presented in connection with the hearing, indicates the Student has made meaningful progress relative to her IEP goals and objectives, the Hearing Officer, again cannot agree with the Parents. In regard to the significance of the word "emerging" that appears in the Student's IEP sheets to describe her performance levels at the end of the school year, the Hearing Officer notes that all of the Co-op and School District staff who testified about the matter said emphatically that the word "emerging" was not used to indicate meaningful progress by the Student. As for the data taken by the School District's inclusion/special needs coordinator, the Hearing Officer regards it as too fragmentary a basis to draw any conclusions concerning whether or not the Student has progressed meaningfully in connection with her IEP goals and objectives.

Finally, in regard to the Parent's contentions of procedural violations of the IDEA by the School District, the Hearing Officer does not believe that the violations the Parents allege the School District to have committed with respect to not meeting statutory and regulatory timelines significantly bear upon any of the findings or relief the Parents have requested in this case. The Hearing Officer has arrived at the same conclusion in regard to the claim of the Parents that the School District allowed its expert consultant to observe the Student without the Parent's consent. As for the Parents'

contentions that the School District denied the Parents meaningful opportunity to participate in the IEP process and refused to consider adequately the recommendations of experts familiar with the Student, it seems to the Hearing Officer that the issues raised in this connection by the Parents do not concern procedural violations of the IDEA. Instead, in the opinion of the Hearing Officer, the Parents' concerns relate to the complex and difficult to resolve issues at the heart of this case that the Hearing Officer has sought to address, to the best of his ability, in the body of this opinion.

Conclusion:

The School District and the Parents in this case agree that a beneficial program for the Student must include significant components of both one on one instruction and inclusive interaction with her non-disabled peers. The principal issue in dispute concerns the relative scopes of these components in the Student's program. No research studies exist at this time concerning the most effective educational approaches in the classroom to use for developing the communicational and cognitive abilities of student's with Rett Syndrome. None of the expert witnesses, or professional educators involved with the Student, called to testify by either party in this case, has worked with more than a small number children with Rett Syndrome over the course of her or his career. Furthermore, the Parents and the School District report strikingly different degrees of success with respect to their efforts in fostering the Student's abilities in the areas of communication and cognition. In this regard, the Hearing Officer cannot find decisive testimony or evidence in the record of this case for crediting the Parents' reports over the School District's or *vice versa*.

Appendix C

Under the second prong of the *Rowley* test a school district's program for a special needs student qualifies as appropriate only if reasonably calculated to provide the student educational benefit. As indicated earlier, the Hearing Officer believes that in circumstances like those attending this case, a school district's proposed program is reasonably calculated to provide educational benefit for a student to the extent it reflects careful and competent analysis that includes reasonable efforts to obtain relevant information needed to develop a beneficial placement for the Student. The Hearing Officer also believes, as indicated earlier, that in circumstances like those in this case, the same standard applies with respect to assessing a School District's conclusion that a given placement would be inappropriate for a student.

Applying the above described framework of analysis to the facts of this case, presented to the Hearing Officer by the parties, the Hearing Officer has concluded the following:

(1) The Hearing Officer regards the ELS Program, proposed by the School District for The Student as reasonably calculated, in the sense articulated immediately above, to provide educational benefit for her.

(2) The Hearing Officer regards the School District's conclusion that a regular education placement would be inappropriate for the Student to reflect a careful and competent analysis that includes reasonable efforts to obtain information needed to develop a beneficial placement for the Student.

Appendix C

Ruling

The placement proposed by the School District for the Student in this case meets the responsibility of the School District under the IDEA to provide an appropriate placement for her in the least restrictive environment. The Hearing Officer hereby declines to issue any of the findings or grant any of the relief requested by the Parents.

Right to Request Clarification

Either party may request clarification of this decision by submitting a written request for such clarification to the Hearing Officer within five (5) days of receipt of this decision. The request shall specify the portions of the decision for which clarification is sought and a copy of the request shall be mailed to the other parties and to the Illinois State Board of Education. **The right to request such clarification does not permit a party to request reconsideration of the decision itself and the Hearing Officer is not authorized to entertain a request for reconsideration.**

Right to File Civil Action

Any party to this hearing aggrieved by this final decision has the right to commence a civil action with respect to the issues presented in the hearing. Pursuant to 105 ICLS 5/14-8.0s(I), that civil action shall be brought in any court of competent jurisdiction within 120 days after a copy of this decision was mailed to the party.

Appendix C

This Decision and Ruling rendered this 26th day of May, 26, 2000

/s/_____
Robert F. Ladenson
Impartial Hearing Officer

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED APRIL 3, 2002

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

April 3, 2002

Before

Hon. JOEL M. FLAUM, Chief Judge

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

No. 00 CV 4771.

James B. Moran,
Judge

No. 01-3673

`. and SUSAN AND TOM B., individually and as next friends of BETH B.,

Plaintiffs-Appellants,

v.

.N CLAY, individually and in his official
, superintendent, and LAKE BLUFF SCHOOL DISTRICT #65,

Defendants-Appellees.

Appendix D

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

ORDER

On consideration of the petition for rehearing and petition for rehearing en banc filed in the above-entitled case on March 19, 2002, by plaintiffs-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

APPENDIX E — STATUTORY PROVISIONS INVOLVED

UNITED STATES CODE ANNOTATED
TITLE 20. EDUCATION
CHAPTER 33 — EDUCATION OF INDIVIDUALS WITH DISABILITIES

SUBCHAPTER II — ASSISTANCE FOR EDUCATION OF ALL CHILDREN WITH DISABILITIES

20 U.S.C.A. § 1412

§ 1412. State eligibility

(a) In general

A State is eligible for assistance under this subchapter for a fiscal year if the State demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets each of the following conditions:

(1) Free appropriate public education

(A) In general

A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

* * *

Appendix E

(4) Individualized education program

An individualized education program, or an individualized family service plan that meets the requirements of section 1436(d) of this title, is developed, reviewed, and revised for each child with a disability in accordance with section 1414(d) of this title.

(5) Least restrictive environment

(A) In general

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

* * *

Appendix E

(6) Procedural safeguards

(A) In general

Children with disabilities and their parents are afforded the procedural safeguards required by section 1415 of this title.

* * * *

Appendix E

20 U.S.C.A. § 1415

§ 1415. Procedural safeguards

(a) Establishment of procedures

Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies.

* * *

(f) Impartial due process hearing

(1) In general

Whenever a complaint has been received under subsection (b)(6) or (k) of this section, the parents involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

* * *

Appendix E

(i) Administrative procedures

(1) In general

(A) Decision made in hearing

A decision made in a hearing conducted pursuant to subsection (f) or (k) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (g) of this section and paragraph (2) of this subsection.

(B) Decision made at appeal

A decision made under subsection (g) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

'2) Right to bring civil action

'A) In general

Any party aggrieved by the findings and decision made under subsection (f) or (k) of this section who does not have the right to an appeal under subsection (g) of this

section, and any party aggrieved by the findings and decision under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

(B) Additional requirements

In any action brought under this paragraph, the court —

(i) shall receive the records of the administrative proceedings;

(ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

* * * *

(2)

Supreme Court, U.S.
FILED
SEP 4 2002
CLERK

No. 02-172

IN THE

Supreme Court of the United States

BETH B. and SUSAN AND TOM B., Individually and as Next Friends of BETH B.,

Petitioners,

v.

MARK VAN CLAY, Individually and in his Official Capacity as Superintendent, and LAKE BLUFF SCHOOL DISTRICT #65,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

The School District in this case prevailed before the Seventh Circuit, the district court and the administrative hearing officer. Pet., App. A at 12a; App. B at 39a; App. C at 103a. All three held that the School District satisfied its legal burden of designing a program for Beth that was reasonably calculated to enable her to receive educational benefit. Pet., App. A at 11a; App. B at 24a; App. C at 103a. All three also held that the educational program recommended by the School District provided Beth with a free appropriate public education ("FAPE") in the least restrictive environment ("LRE"). *Id.*

Beth is 14 years old and would currently be enrolled in the eighth grade.[1] The placement recommended by Beth's Individualized Education Program ("IEP") team is in a self-contained special education classroom in a neighboring school district in a building that also serves regular education students, thus allowing opportunities for mainstreaming. Pet., App. A at 4a.

This self-contained placement is appropriate for Beth because of the severe and profound nature of her disabilities. Estimates of her cognitive ability vary from that of a one-year-old to a six-year-old. Pet., App. A at 3a. Beth is nonverbal and wheelchair-bound. *Id.* She requires one-on-one assistance from at least one adult (sometimes two) during the entire school day. *Id.* Beth is unable to read or recognize letters or numbers. *Id.* Her school work is individually modified for her at a preschool level. *Id.*

---

1. Beth is not currently attending a public school. Her parents withdrew her from school at the beginning of the 2001-2002 school year.

Petitioners' theory is that the administrative hearing officer did not know which way to decide this case so he deferred to the School District's recommendation. Pet. at 9. Petitioners further claim that the district court and the Seventh Circuit then compounded this "error" by upholding the hearing officer's decision, and in the process, committed numerous errors of their own. However, even cursory reviews of the three underlying decisions in this case demonstrate that at each level, and with each issue, the facts were carefully reviewed and the applicable laws were properly interpreted and applied.

Petitioners would have this Court believe that every Circuit Court to have considered the issue of LRE to date has done so incorrectly. Pet. at 20. They submit to this Court that the Circuits are in "disarray" and that this Court should intervene to instruct them as to the correct test. Pet. at 21. Simply put, Petitioners advocate a test that would result in no child being removed from his or her regular education home school.

The Seventh Circuit saw through Petitioners' argument: "Instead of granting flexibility and the deference they are owed; [Petitioners' proposed test] essentially vitiates school districts' authority to place any disabled children in separate special education environments. Neither Congress nor the Supreme Court intended such a result." Pet., App. A at 10a.

The questions presented in the Petition could scarcely be more confusing, which is compounded by the liberties Petitioners take with the facts of the case. For example, contrary to Petitioners' assertion, Beth's academic progress in the regular education setting was, in the words of the Seventh Circuit, "virtually nonexistent." Pet., App. A at 11a.

Petitioners' statement that Beth was "sometimes absent" flies in the face of the Seventh Circuit's finding that "Beth was in class for about fifty percent of each day." *Id.*

Petitioners also mislead this Court by stating that the hearing officer "did not find that the School District's proposed placement of Beth was better than that conferred in regular school, nor did he conclude that she could not receive educational benefit from her regular school placement." Pet. at 9. The hearing officer did not make these findings because *these are not the correct standards*. The hearing officer applied the correct standard and unequivocally held that:

> The placement proposed by the School District for the Student in this case meets the responsibility of the School District under the IDEA to provide an appropriate placement for her in the least restrictive environment. The Hearing Officer hereby declines to issue any of the findings or grant any of the relief requested by the Parents.

Pet., App. C at 103a.

The Seventh Circuit's decision does not raise the questions presented by the Petition. The decision is not in conflict with either the Individuals with Disabilities Education Act ("IDEA") or any court decision. The three articulated LRE tests from the Fifth, Sixth and Ninth Circuits do not contradict each other. In fact, the three tests are nearly identical. The Seventh Circuit did not adopt a test, instead choosing to rely directly on the language of the IDEA and its implementing regulations. Pet., App. A at 10a. The Seventh Circuit properly decided that the School District's decision

to remove Beth from a regular education setting did not violate the IDEA's mandate for mainstreaming. Pet., App. A at 11a. For these reasons, Respondents respectfully ask this Court to deny the Petition for Writ of Certiorari.

I.

THE SEVENTH CIRCUIT'S DECISION DOES NOT PRESENT A CONFLICT AMONG THE CIRCUITS NOR DOES IT CONFLICT WITH THE IDEA

Compelling reasons for granting a writ of certiorari include a conflict between courts of appeals on an important matter or a decision by a court of appeals on an important federal question that conflicts with a decision of this Court. Sup. Ct. R. 10. Petitioners do not allege a conflict between the Seventh Circuit's decision and a decision of this Court. They do, however, contend that the criteria applied by the Seventh Circuit for assessing Beth's placement in the LRE are at odds with the criteria applied by other Circuits. This is not the case.

This Court has not adopted an LRE test. *Murray v. Montrose County School District*, 51 F.3d 921 (10th Cir. 1995), *cert. denied*, 516 U.S. 909 (1995). The three generally recognized LRE tests are the Fifth Circuit's *Daniel R.R.* test, the Sixth Circuit's *Roncker* feasibility test, and the Ninth Circuit's *Holland* test. *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989); *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983), *cert. denied*, 464 U.S. 864 (1983); *Sacramento City Unified Sch. Dist. v. Rachel H. by Holland*, 14 F.3d 1398 (9th Cir. 1994), *cert. denied*, 512 U.S. 1207 (1994).

A. *Roncker* LRE Test

The Sixth Circuit was the first Circuit Court to establish an LRE test, commonly referred to as the "feasibility" or "*Roncker*" test. *Roncker*, 700 F.2d at 1060. This test has been adopted by the Fourth and Eighth Circuits. *Hartmann v. Loudoun County Board of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997), *cert. denied*, 522 U.S. 1046 (1998); *Devries v. Fairfax County School Board*, 882 F.2d 876, 879 (4th Cir. 1989); *A.W. v. Northwest R-1 Sch. Dist.*, 813 F.2d 158, 163 (8th Cir. 1987), *cert. denied*, 484 U.S. 847 (1987).

Applying the *Roncker* test, one must first determine whether the services which make a self-contained placement superior could be feasibly provided in a less restrictive setting. *Roncker* at 1063. If so, placement in a self-contained program would not be appropriate. *Id.* The court recognized that a self-contained placement would be appropriate when the student would not benefit from mainstreaming or was a disruptive force in the regular education setting. *Id.* at 1063.

The *Roncker* Court considered a number of factors, including: the student's progress, or lack thereof, in the regular education setting; what services the student was provided with in the regular education setting; the cost of the services provided; and the effect the student's presence had on his or her peers. *Id.* at 1063-64. The *Roncker* Court recognized that the educational, physical and emotional needs of a special education student all had to be taken into account when making a decision concerning the student's educational placement. *Id.* at 1063.

B. *Daniel R.R.* LRE Test

The *Daniel R.R.* LRE test was articulated by the Fifth Circuit in 1989. *Daniel R.R.*, 874 at 1048-49. The *Daniel R.R.* test has been adopted in the Third, Ninth and Eleventh Circuits. Michael A. Rebell, *Special Education Inclusion and the Courts: A Proposal for a New Remedial Approach*, 25 J.L. & Educ. 523, 560 (1997), *citing Greer v. Rome City Sch. Dist.*, 950 F.2d 688 (11th Cir. 1991), *op. withdrawn*, 956 F.2d 1025 (11th Cir. 1992), *op. reinstated in part*, 967 F.2d 470 (11th Cir. 1992), *reh'g denied*, 974 F.2d 173 (11th Cir. 1992); *Oberti v. Board of Educ.*, 995 F.2d 1204 (3d Cir. 1993); *Poolaw v. Bishop*, 67 F.3d 830 (9th Cir. 1995); *Holland*, 14 F.3d at 1401.

The first prong of the *Daniel R.R.* test asks whether education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily. *Daniel R.R.*, 874 F.2d at 1048. The factors considered by the court in the first prong of the test are non-exhaustive and must be based on the facts of each case, including: the steps taken to accommodate the student in a regular education classroom; whether the student can receive educational benefit in a regular education setting; the student's experience in the regular education classroom; and the effect the student's presence has on the other children in the regular education classroom. *Id.* at 1048-50.

The second prong of the *Daniel R.R.* test clarifies that if placement outside the regular education classroom is necessary, the school district must mainstream the student to the maximum extent appropriate. *Id.* at 1050.

C. *Holland* LRE Test

The Ninth Circuit adopted a hybrid of the *Daniel R.R.* and *Roncker* tests:

> Although the district court relied principally on *Daniel R.R.* and *Greer*, it did not specifically adopt the *Daniel R.R.* test over the *Roncker* test. Rather, it employed factors found in both lines of cases in its analysis. The result was a four-factor balancing test in which the court considered (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect Rachel had on the teacher and children in the regular class; and (4) the costs of mainstreaming Rachel. This analysis directly addresses the issue of the appropriate placement for a child with disabilities under the requirements of [the IDEA]. Accordingly, we approve and adopt the test employed by the district court.

Holland, 14 F.3d at 1404.

D. Seventh Circuit's LRE Analysis

In an LRE case decided in 1988, the Seventh Circuit applied the criteria of the *Roncker* feasibility test, without adopting the test, per se. *Lachman v. Illinois State Board of Education*, 852 F.2d 290, 299 (7th Cir. 1988), *cert. denied*, 488 U.S. 925 (1988). Seven years later, the Seventh Circuit specifically denied that it had adopted an LRE standard: "This Court has not set forth a specific test for the lower courts to apply regarding the determination of LRE. . . ."

Monticello School District No. 25 v. George L., 102 F.3d 895, 906 (7th Cir. 1996); *See also D.F. v. Western School Corp.*, 921 F.Supp. 559, 566 (S.D. Ind. 1996) (finding that the Seventh Circuit had not adopted an LRE test).

The Seventh Circuit similarly declined to adopt an LRE test in this case. Instead, the Court held that the IDEA provided an appropriate framework to decide LRE cases "since each student's educational situation is unique." Pet., App. A at 10a. The Court held that:

> [I]f Beth's education at Lake Bluff Middle School was satisfactory, the school district would be in violation of the Act by removing her. If not, if its recommended placement will mainstream her to the maximum appropriate extent, no violation occurs. In this case, we can say with confidence that the Lake Bluff school district's decision to remove Beth from her regular school did not violate the IDEA's mandate to mainstream disabled children to the maximum extent appropriate.

Pet., App. A at 10a-11a.

The Seventh Circuit's decision is a genuinely common-sense approach to the LRE issue. The IDEA and its implementing regulations state that to the "maximum extent appropriate," children with disabilities will be educated with children who are nondisabled and children with disabilities will only be removed from the regular education environment "if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."

Individuals with Disabilities Education Act, 20 U.S.C. § 1412(a)(5)(A) (1997); Assistance to States for the Education of Children with Disabilities, 34 C.F.R. § 300.550(b) (1999).

The definitions of "appropriate" and "satisfactory" in this context will depend on the needs of the student at issue, a fact which this Court has previously recognized:

> The [IDEA's] use of the word 'appropriate' thus seems to reflect Congress' recognition that some settings simply are not suitable environments for the participation of some handicapped children.

Bd. of Educ. v. Rowley, 458 U.S. 176, 197 n.21 (1982).

For one student, issues concerning behavior and disruption to her classmates will rise to the forefront. For another student, a sixth grade curriculum that is modified to a preschool level will take precedence. For yet a third student, the ability to model the language and/or behaviors of his peers will be the determining factor.

The regulations implementing IDEA provide even more specific LRE considerations: the IEP team making the placement decision must include the parents, other persons knowledgeable about the child, the meaning of the evaluation data and the placement options; the placement recommended by the team must be as close as possible to the child's home; the child must be educated in his or her home school unless the IEP requires a different arrangement; consideration must be given to any potential harmful effects on the child or on the quality of services that he or she needs; and modifications

to the general curriculum cannot be the sole basis for removing a child from his or her home school. 34 C.F.R. § 300.552 (1999).

Contrary to what Petitioners would have this Court believe, all four of the above-described LRE tests (analysis in the Seventh Circuit) are nearly identical. They each require the decision-maker to examine the student's current educational placement and the proposed educational placement. *Roncker* begins by looking at the more restrictive placement, then asks whether the less restrictive placement can be made appropriate. *Roncker*, 700 F.2d at 1063. *Daniel R.R.* simply does the opposite, by first evaluating the appropriateness of the less restrictive placement, then turning its attention to the more restrictive placement. *Daniel R.R.*, 874 F.2d at 1048.

Holland adopted a hybrid of the *Roncker* and *Daniel R.R.* tests, a perfect example of how compatible the tests are. *Holland*, 14 F.3d at 1404. Finally, the Seventh Circuit held that the IDEA itself provides the appropriate framework for LRE decisions to be made, which takes into account precisely the same factors that its three sister Circuits found applicable in their LRE analyses. Pet., App. A at 10a.

The same fact pattern applied to each of the LRE analyses adopted by these four Circuits would result in identical outcomes. Each of the LRE tests articulated by the Circuit Courts, including the Seventh Circuit's analysis, uses as its baseline the student's unique needs. Contrary to Petitioners' assertion, each Circuit Court recognizes the IDEA's LRE mandate, a cornerstone of the IDEA.

Petitioners fail to articulate how the Circuits are split on the issue of determining LRE. Since each Circuit Court to examine the issue has applied the same reasoning, there is no conflict between the Circuits.

In addition, Petitioners argued, but failed to show how the Seventh Circuit's decision conflicts with the language of the IDEA. The Seventh Circuit specifically applied the language of the IDEA and its implementing regulations in making its decision. Pet., App. A at 10a.

II.

THIS CASE DOES NOT HAVE FAR-REACHING SPECIAL EDUCATION IMPLICATIONS

The fact pattern of this case is impossible of being replicated. It addresses Beth's education and her unique needs. The Seventh Circuit's decision to interpret the language of the IDEA and its implementing regulations when determining LRE issues is entirely appropriate and recognizes the individualized nature of the IEP process.

The Seventh Circuit's decision will not result in a single instance (let alone an onslaught as Petitioners would have this Court believe) of a more restrictive educational placement being made for a child with a disability. Recommendations for more restrictive placements are made on a case-by-case basis and take into account the expertise of school officials that even the Seventh Circuit held it "[could not] match." Pet., App. A at 11a.

Contrary to Petitioners' assertion, the Seventh Circuit's decision does not require disabled children to "justify" their

presence in regular education classrooms. Obviously designed to catch this Court's attention, Petitioners ignore the crux of the decision:

> [The IDEA's] preference for mainstreaming demands a hard look and a careful analysis of the education Beth was receiving at Lake Bluff Middle School. Beth's parents rely on misplaced language from *Rowley* to argue that so long as she was receiving *any* benefit — improvement in eye contact, or progress in responding to a request to "look" or "touch" — her removal would violate the LRE requirement. We cannot agree with this definition of satisfactory education. . . . Beth's parents turn the "some educational benefit" language on its head. Instead of granting flexibility to educators and school officials, [parents' argument] places an extreme restriction on [school districts'] policymaking authority and the deference they are owed; it essentially vitiates school districts' authority to place any disabled children in separate special education environments. Neither Congress nor the Supreme Court intended such a result.

Pet., App. A at 9a-10a (citations omitted).

This case does not have far-reaching implications for students receiving special education services. Petitioners' attempt to argue such should be disregarded.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 02-172

IN THE

Supreme Court of the United States

BETH B. and SUSAN AND TOM B.,
Individually and as Next Friends of BETH B.,

Petitioners,

v.

MARK VAN CLAY, Individually and in his Official Capacity as Superintendent, and LAKE BLUFF SCHOOL DISTRICT #65,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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REPLY BRIEF IN OPPOSITION

Respondents work hard to create the illusion that the "least restrictive environment" ("LRE") tests adopted by the various Circuit Courts are "nearly identical," but their brief merely illustrates the confusion and incoherence that plague the lower courts. Respondents argue that tests that "simply do the opposite" or are "hybrids" of one another are "nearly identical" in a transparent attempt to gloss over the inter-Circuit conflicts. Respondents' Brief in Opposition ("Opp.") at 10. Contrary to Respondents' argument, application of the four different LRE tests applied by the Circuits to the same set of facts will often result in different outcomes. The Seventh Circuit's decision, and the split among the Circuits, will have far-reaching implications for children with disabilities in the Seventh Circuit and throughout the United States. Further, Respondents recognize that this Court has not addressed the correct standard for applying the LRE test, virtually conceding the certworthiness of this case.

I. The Seventh Circuit Decision Conflicts With The Third And Ninth Circuits' Decisions By Misapplying The Presumption In Favor Of Mainstreaming.

The Individuals with Disabilities Education Act ("IDEA") requires that the school district bear the burden of proving, by a preponderance of the evidence, that a more restrictive placement meets the IDEA's mainstreaming requirements[1] to educate the child in the "least restrictive environment" "to the maximum

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1. Respondents have yet to identify the school district or "building" to which they would assign Beth notwithstanding their rhetoric that it will be a "neighboring school district." Opp. at 1. Indeed, the "neighboring school districts" identified as possible placements by Respondents are as much as an hour away, an exhausting bus ride for a girl with Rett Syndrome. The bus ride alone would steal valuable amounts of Beth's most productive learning time and experts testified that it would actually harm her education. The potential harm to Beth was ignored by the Seventh Circuit. Further Respondents have not yet committed to any mainstreaming despite their reference to "opportunities for mainstreaming." Pet., App. A at 4a n.1.

extent appropriate." IDEA, 20 U.S.C.A. § 1412(a)(5)(A); 34 C.F.R. § 300.551. Respondents have failed to carry this burden. The hearing officer, and subsequently the district court and Seventh Circuit, relieved the School District of its burden and applied an incorrect legal standard that erroneously deferred to the School District's presumed expertise when the evidence was insufficient to satisfy the School District's burden.[2] *See* Pet. at 9, 13-15.

Perhaps lacking anything persuasive to say on the subject, Respondents argue that the hearing officer's failure to consider factors cited by other Circuits as part of the LRE analysis was irrelevant. Opp. at 3. Respondents also argue that the hearing officer applied the "correct standard" to the LRE question, citing a passage in his opinion which underscores our point, not Respondents. Opp. at 3. The quoted passage contains no standard but only the empty conclusion that Respondents satisfied the IDEA because the process they went through to make their placement decision was adequate.

Contrary to Respondents' assertion, there is nothing at all misleading in Petitioners' arguments concerning the hearing officer's failure to make factual findings that the School District

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2. Significantly, in deferring to the School District's experts, the Seventh Circuit disregarded the hearing officer's finding that he was unable to credit the testimony of one party's experts over the other. Pet., App. C at 78a-79a. Petitioners' equally qualified experts testified that Beth's curriculum was far more advanced than preschool. Even the hearing officer noted that Beth's providers stated that she was writing stories and poems by the second grade with assistative devices. *See, e.g.*, Pet., App. C at 62a. The Seventh Circuit also adopted Respondents' characterization of Beth as being "in class" for only about fifty percent of each day and Respondents' latch on to this as proof that Beth was more than "sometimes absent." However, as Respondents well know, a portion of her time spent outside of her physical classroom was spent with private educators or in physical, occupational or speech therapy sessions which were a part of her IEP, and as such, were part of her educational program.

carried its burden of proof. As discussed in the Petition at length, the hearing officer repeatedly stated that he was unable to find decisive evidence to credit the testimony of one side over the other. *See id.* On the basis of this finding alone, the correct conclusion of law was that Respondents failed to carry their burden of proof justifying removal of Beth from her regular school placement. Instead, the hearing officer invented a new legal standard against which to measure the school district's placement decision, finding that the school district was only required to make an "adequate" effort in determining Beth's placement. This error transforms the IDEA's substantive presumption in favor of mainstreaming into a mere procedural safeguard that looks to the adequacy of the School District's decision-making process and its lack of bad faith as grounds for approving the placement decision.[3] Each of the lower courts applied the improper standard of deference to the School District in a decision that all but eviscerates the substantive rights Congress provided for children with disabilities under the IDEA.

As explained in the Petition, the Seventh Circuit's undue deference to school district is in direct conflict with decisions in both the Third and the Ninth Circuits. Pet. at 16-17. The Third Circuit recognized that such deference would be an abdication of its obligation to enforce the statutory provisions of the IDEA. *Polk v. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 184 (3d Cir. 1988). The Ninth Circuit held that treating the views of school personnel as conclusive would make administrative review unnecessary. *See Ojai Unified School Dist. v. Jackson*, 4 F.3d 1467, 1476 (9th Cir. 1993).

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3. These are the "procedural" standards identified in the hearing officer's opinion and approved by the lower courts in this case. *See* Pet., App. C at 78a-80a, 91a; Pet., App. B at 23a-24a.

II. The LRE Test Adopted By The Seventh Circuit Conflicts With The Tests Adopted By Other Circuits And Application Of The Various Tests To One Set Of Facts Will Result In Different Treatment Of Children With Disabilities Depending On The Circuit In Which They Reside.

Not only do the various LRE tests applied throughout the country conflict on the question of which placement the court should consider as the beginning point of the LRE analysis, they also require the consideration of different factors to determine if a placement is appropriate. These differences, contrary to Respondents' arguments, are not merely semantic; they lead to different results depending upon the Circuit. Respondents ignore these differences and characterize the tests as "nearly identical" despite the fact that they concede that one "simply does the opposite" of the other or that some are hybrids of others. Opp. at 10.

A. The lower courts are in conflict on the baseline for the LRE analysis under each of the LRE tests.

The Sixth Circuit's decision in *Roncker* begins its analysis by looking at the more restrictive placement, while the Ninth Circuit in *Holland* and the Fifth Circuit in *Daniel R.R.* start with the less restrictive placement. Opp. at 10; *Sacramento City Unified Sch. Dist. v. Rachel H. by Holland*, 14 F.3d 1398, 1400-01 (9th Cir. 1994); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048-50 (5th Cir. 1989); *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983). The Seventh Circuit picked yet a third starting place — the school district's recommended placement. Pet., App. A at 8a.

Under *Roncker*, the primary focus of the LRE analysis is on the services available in the more restrictive placement. *Roncker*, 700 F.2d at 1063. If services which are superior in the restrictive placement cannot be implemented feasibly in a regular classroom, then the more restrictive placement is appropriate. *See id.* Presumably any child, whether disabled or not, would benefit academically from the smaller class size that typically characterizes the segregated special education classroom.

Similarly, by their nature, special education classrooms are meant to provide certain services that are not easily or conveniently duplicated in the regular classroom. These factors tip the scales toward the restrictive placement in every case. This silent presumption in favor of the more restrictive placement will necessarily affect the outcome of cases considered in the Sixth Circuit, and the Fourth and Eighth Circuits, which follow *Roncker*. *See Devries v. Fairfax County Sch. Bd.*, 882 F.2d 876, 878-79 (4th Cir. 1989); *A.W. v. Northwest R-1 Sch. Dist.*, 813 F.2d 158, 163 (8th Cir. 1987). If the school district wishes to segregate a child in a restrictive classroom setting, it can point to a plethora of services offered in special education not conveniently or economically offered in the regular classroom, and from there, argue that such services are not "feasibly" provided in the regular classroom.

Under the Fifth Circuit's *Daniel R.R.* decision, the focus is on whether education in the regular classroom with the use of supplemental aids and services can be achieved satisfactorily for a given child. *Daniel R.R.*, 874 F.2d at 1048-50. If it cannot, the court must ask whether the school has mainstreamed the child to the maximum extent appropriate in the more restrictive setting. Similarly, under the Ninth Circuit's test in *Holland*, the focus is on the benefits and services available in the regular education classroom.[4] *Holland*, 14 F.2d at 1400-01. By beginning the analysis with the least restrictive placement and maintaining a presumption of regular education unless proven inappropriate, *Daniel R.R.* and *Holland* at least start at the proper baseline because they maintain the IDEA's presumption favoring mainstreaming. However, as discussed below, they apply various factors that are not found in the IDEA and deny children their substantive rights as a result.

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4. *Holland* balances the factors of: (1) educational benefits available to the student in a regular classroom; (2) non-academic benefits of interactions with non-disabled children; (3) the effect of the student's presence on the teacher and other children in the classroom; and (4) the cost of mainstreaming the student. *Holland*, 14 F.3d at 1400-01.

The Seventh Circuit's LRE analysis starts from yet another — and exceedingly dangerous — baseline, the school district's proposed placement. *See* Pet., App. A at 8a-10a. Under the Seventh Circuit's test, courts first determine whether a school district's proposed placement meets the "free and appropriate education" standard by providing some educational benefit, even if it is the more restrictive placement. *See id.* If so, the burden effectively shifts to the parents and child to show that another, less restrictive placement, is more appropriate so long as the school district acted adequately in its decision-making process and didn't overtly demonstrate bad faith. *See id.* If, instead, the Seventh Circuit began its baseline inquiry with the least restrictive placement, as urged by Petitioner — not the school district's proposed placement — and asked whether a "free and appropriate education" was provided in the less restrictive placement, then it would have properly applied the presumption in favor of mainstreaming. Instead, the Seventh Circuit turned the presumption to favor school districts — bringing it in direct conflict with other circuits, including the Third Circuit in *Oberti*. *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1219 (3d Cir. 1993) (holding that the presumption in favor of mainstreaming "would be turned on its head if parents had to prove that their child was worthy of being included, rather than the school district having to justify a decision to exclude the child from the regular classroom."). This is particularly so since the school district, the party with better access to relevant information, will have no motivation to submit evidence in support of a placement it does not recommend. *See id.*

B. The various LRE tests do not take the same factors into consideration, resulting in different outcomes for one set of facts in Circuits with different tests.

There are many different LRE factors considered by the various Circuits, resulting in inter-Circuit conflicts. For example, the Circuits do not agree upon whether, or how much, to consider "non-academic" benefits of placement in a regular education classroom. As discussed *supra*, the *Roncker* test focuses

primarily on the academic advantage available to the student in a segregated placement without any significant regard to the other benefits to the student of placement in the regular classroom. *Roncker*, 700 F.2d at 1063. Thus, under *Roncker*, if the proposed placement is found to be academically superior and cannot be implemented feasibly in a regular classroom, then the child would likely be placed in a segregated classroom and the court would not consider the benefits of the less restrictive placement.

Similarly, while the Seventh Circuit has not articulated specific factors to be considered in its LRE analysis, in this case, evidence of non-academic benefits was presented to the court, but disregarded by it. Pet., App. A at 11a. For example, the Seventh Circuit acknowledged that Beth made limited developmental achievement, but held that, in light of Beth's lack of academic progress in comparison to her peers, this did not constitute a satisfactory education. Pet., App. A at 11a. Further, while Beth made progress in relation to her own IEP,[5] the Seventh Circuit measured her academic progress against peers as "virtually nonexistent." Thus, the Seventh Circuit disregards evidence of progress unless it is measurable academic progress made in relation to peers and in so doing, condemns children with moderate to severe disabilities to segregated restrictive placements regardless of what benefits they may achieve from regular school placement.

On the other hand, the outcome would likely be different for a child in the D.C. Circuit, the Fifth Circuit, or Third Circuit. Both *Oberti* and *Daniel R.R.* hold that simply because a child

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5. While the physical symptoms of Rett Syndrome detailed in our Petition make it difficult to determine Beth's cognitive abilities and progress accurately and consistently, Beth's private therapist testified that between November 1999 and June 2000, Beth had progressed in thirteen of the sixteen objectives set by the School District, and made no progress in only two areas. Even the School District's own experts concede that "there are clearly some areas in which Beth has displayed some progress." *See Beth B. v. Van Clay*, No. 00 C 4771, Pl.'s Ex. 5; AR 2327-35; AR 10401-13; AR 11193; AR 13226-32.

with disabilities might make greater *academic* progress in a segregated, special education class does not warrant excluding the child from a regular classroom environment. *Oberti*, 995 F.2d at 1217; *Daniel R.R.*, 874 F.2d at 1049. Both courts specifically acknowledge that "[i]ntegrating a handicapped child into a nonhandicapped environment may be beneficial in and of itself." *Oberti*, 995 F.2d at 1217; *Daniel R.R.*, 874 F.2d at 1049. In the same vein, the D.C. Circuit has defined the LRE requirement as "one that confers *some educational benefit* but most closely approximates education with nonhandicapped children in the school that the handicapped child would attend if he had no handicap." *Kerkam v. Superintendent, D.C. Pub. Schs.*, 931 F.2d 84, 87 (D.C. Cir. 1991) (*emphasis added*); Pet. at 18-20.

A second difference between the tests is identified by the Third Circuit in *Oberti*, when it rejected the *Roncker* test in favor of the *Daniel R.R.* test. *Oberti*, 995 F.2d at 1215. The *Oberti* court notes that *Roncker* compares placement in a segregated class with placement in a regular class without considering interim solutions whereas the *Daniel R.R.* test recognizes that the IDEA requires consideration of interim solutions to ensure that a child is mainstreamed whenever possible. *See id.* (finding that, as opposed to the *Daniel R.R.* test, "the *Roncker* test fails to make clear that even if placement in the regular classroom cannot be achieved satisfactorily for the major portion of a particular child's education program, the school is still required to include that child in school programs with non-disabled children . . . whenever possible."). Under *Roncker*, the child for whom mainstreaming is appropriate for a majority of the day, but who would benefit from a few hours in a segregated setting would be placed in a segregated classroom full-time. Whereas the same child under *Daniel R.R.* or *Oberti* would be permitted to remain in regular education for part of his or her day and attend a segregated class for a portion of their day. *See id.*

A third difference between the LRE tests is that only *Oberti* requires consideration of the benefits to non-disabled students of including students with disabilities in the class. *Oberti*, 995 F.2d at 1217 n.24. ("Courts should also consider the reciprocal benefits of inclusion to the non-disabled students in the class"). This factor is an essential difference as it supports the presumption in favor of mainstreaming and will, in cases where the benefits of a segregated placement over placement in a regular classroom are evenly distributed, tip the balance in favor of mainstreaming, a presumption intended by Congress. Congress intended the IDEA to benefit non-disabled students as well as disabled students. *See* Pet. at 2-3. The Seventh Circuit did not consider this factor. Pet., App. A at *passim*.

A fourth difference between the tests is that *Daniel R.R.* treats the degree of modification to the regular curriculum as a potentially dispositive factor in placement decisions, whereas the *Holland* test does not. *Daniel R.R.*, 874 F.2d at 1049; *Holland*, 14 F.3d at 1400-01. The effect of this difference on the outcome of similarly situated students is demonstrated by Respondents' hypothetical student who has a "sixth grade curriculum that is modified to a preschool level." Under *Daniel R.R.*, the degree of modification could be dispositive: "mainstreaming would be pointless if we forced instructors to modify the regular education curriculum to the extent that the handicapped child is not required to learn any of the skills normally taught in regular education." *Daniel R.R.*, 874 F.2d at 1049. This overly narrow construction ignores situations such as Beth's where, we urge, language and comprehension are learned by exposure to peers without disabilities and that this is an educational benefit. Moreover, under the *Holland* test, if the cost of implementing the curriculum change is not substantial, the child receives academic and non-academic benefit from remaining in the regular classroom and the child is not disruptive to the other students, that child would likely remain in the regular classroom. *Holland*, 14 F.3d at 1400-01. Similarly, under the *Oberti* test, the court acknowledges that "the school must also

make efforts to modify the regular education program to accommodate a disabled child," without putting any limitation on the amount of modification required. *Oberti*, 995 F.2d at 1216.

III. This Case Has Far-Reaching Special Education Implications.

Respondents claim that because "[t]he fact pattern of this case is impossible of being replicated," it does not have far-reaching implications. Opp. at 11. Respondents do not explain what they mean. Certainly parents and school districts frequently address the issue of children's rights for mainstreaming under the IDEA. Every child with disabilities in the Seventh Circuit is affected by the decision below.

The Seventh Circuit effectively shifts the burden of proof on the LRE issue from the school district to parents who will be forced to put forth evidence to prove that their child can be "appropriately" educated in a regular education classroom. This eviscerates the rights of students with disabilities and their parents under the IDEA so that, in the end, students and parents in the Seventh Circuit and other circuits will have fewer rights under the IDEA and less access to education in a regular education setting than students and parents elsewhere.

CONCLUSION

The petition for a writ of certiorari should be granted.

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